

MAY 13 1992

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No. 91-6824

**In The
Supreme Court of the United States**

October Term, 1991

GLORIA ZAFIRO, et al.,

Petitioners,

vs. |

UNITED STATES

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

JOINT APPENDIX

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Petition For Certiorari Filed December 23, 1991

Certiorari Granted March 23, 1992

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RELEVANT DOCKET ENTRIES

United States v. Gloria Zafiro 89 CR 165-01

02/23/89	1	Filed magistrate complaint
	2	Bail not allowed
	3	Filed affidavit
02/28/89	13	Order finding of probable cause
	13	Defendant held to the district court
03/21/89	31	Filed indictment
	32	Bail not allowed
03/28/89	35	Defendant enters plea of not guilty (Counts 1-4)
04/25/89	47	Motion to quash filed
	47	Motion to suppress evidence filed
05/05/89	55	Government's consolidated response to defendants' pretrial motions.
07/11/89	66	Motion to suppress evidence denied
	66	Order filed (Government is ordered to instruct its agents to preserve notes.)
	66	Motion to quash denied
07/12/89	67	Order filed (Government is ordered not to destroy the contraband seized in this case until after the trial has been completed.)
07/13/89	68	Order filed (D.E.A. is ordered to preserve all drug evidence and contraband.)
08/04/89	78	Enter Report and Recommendation of Magistrate Bucklo regarding defendants'

various motions to quash their arrests, to quash search warrant executed by the government in this matter, and to suppress evidence seized by the government following defendants' arrests. All matters relating to the referral of this action having been resolved, this case is returned to the assigned Judge for further proceedings.

- 08/07/89 83 Motion made in open court in limine (MOT#21) (Counts 1-4) (JUDGE BUA)
- 83 Order filed (Defendant's motion in limine is entered and continued for the reasons stated in open court.)
- 86 Motion made in open court to dismiss
- 86 Motion to dismiss denied
- 86 Motion made in open court for mistrial
- 86 Motion for mistrial granted.
- 08/16/89 98 Jury verdict of not guilty (Counts 2-4)
- 98 Jury verdict of guilty (Count 1)
- 98 Court judgment of guilty (Count 1) (Court enters judgment of acquittal to counts 2, 3 and 4.)
- 11/16/89 120 Sentencing of defendant (Count 1) (The defendant has been found not guilty on counts Two (2), Three (3), and Four (4), and is discharged as to such counts. It is ordered that the defendant shall pay to the United States a special assessment of \$50.00, which shall be due immediately. The defendant is hereby committed to the custody of the United States Bureau

of Prisons to be imprisoned for a term of ONE-HUNDRED-FIFTY-ONE (151) MONTHS on Count One, with credit for time served from February 22, 1989. The defendant is remanded to the custody of the United States Marshal. Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.)

- 11/17/89 121 Filed notice of appeal (From final judgment entered November 16, 1989.)
- 123 Jurisdictional Statement.
- 12/07/89 140 Motion for appointment of counsel filed (To appoint trial counsel as counsel on appeal. Notice of motion attached.)
- 141 Motion for appointment of counsel granted (MOT#34) (Thomas J. Royce is appointed as attorney on appeal. Defendant is given leave to proceed on appeal in forma pauperis.)
- 141 Order appointing attorney ROYCE, THOMAS J to represent defendant.
- 10/18/91 179 Filed certified copy of order from U.S. Court of Appeals affirming judgment of U.S. District Court
- 180 Filed opinion of USCA
- 04/03/92 182 Filed copy of order granting leave to proceed in forma pauperis and the petition for writ of certiorari in the above-entitled case.

United States v. Jose Martinez 89 CR 165-02

- 02/23/89 1 Filed magistrate complaint.
- 02/28/89 14 Order finding of probable cause (MAGISTRATE JUDGE BUCKLO)
- 14 Defendant held to the district court (FOR FURTHER PROCEEDINGS) (MAGISTRATE JUDGE BUCKLO)
- 14 Bail not allowed
- 03/21/89 31 Filed indictment
- 32 Bail not allowed (No bond set, detained by Magistrate.)
- 04/04/89 38 Defendant enters plea of not guilty (Counts 1,2-4) (JUDGE BUA)
- 04/25/89 47 Motion to quash filed.
- 47 Motion to suppress evidence filed.
- 04/28/89 51 Motion to quash filed (Search warrant.)
- 52 Motion to suppress evidence filed (Counts 1,2-4)
- 54 Motion for joinder filed (Counts 1,2-4) (To adopt motions of co-defendants.)
- 05/05/89 55 Government's consolidated response to defendants' pretrial motions.
- 07/11/89 66 Motion for joinder granted (JUDGE BUA)
- 66 Motion to suppress evidence denied.
- 66 Order filed (Government is ordered to instruct its agents to preserve notes.)
- 66 Motion to quash denied

- 66 Motion to quash denied (To quash search warrant.)
- 66 Motion to quash denied (To quash arrest.)
- 66 Motion to suppress evidence denied (Illegally seized evidence.)
- 66 Motion for discovery/inspection denied (Of all statements which the government will seek to attribute to defendant.)
- 07/12/89 67 Order filed (Government is ordered not to destroy the contraband seized in this case until after the trial has been completed.)
- 07/13/89 68 Order filed (D.E.A. is ordered to preserve all drug evidence and contraband.)
- 08/04/89 80 Motion for severance/separate trial filed (Counts 1,2-4) (Or in the alternative request for separate jury trial.)
- 08/07/89 83 Motion for severance/separate trial denied (Or for a separate jury trial.)
- 83 Motion made in open court (pre-trial motion) (Counts 1,2-4) (To bar jury during testimony of defendant Zafiro.) (JUDGE BUA)
- 83 Motion (pre-trial motion) mooted (To bar jury during testimony of defendant Zafiro.) (JUDGE BUA)
- 83 Order filed (Defendant's motion in limine is entered and continued for the reasons stated in open court.)
- 86 Motion made in open court to dismiss

- 86 Motion to dismiss denied (JUDGE BUA)
- 86 Motion made in open court for mistrial (Counts 1,2-4)
- 86 Motion for mistrial granted (Jury impanelment begins. Jury trial held and adjourned to August 8, 1989 at 10:00 a.m.)
-
- 08/16/89 99 Jury verdict of guilty (Counts 1,2-4)
- 99 Court judgment of guilty (Counts 1,2-4)
- 09/18/89 111 Order filed (Defendant's motion for a new trial is denied.)
- 11/21/89 125 Sentencing of defendant (Counts 1-4) (It is ordered that the defendant shall pay to the United States a special assessment of \$200.00, which shall be due immediately. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED SIXTY-TWO (262) MONTHS. It is further ordered that defendant be given credit for time already served. Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.) (JUDGE BUA) (Dkt'd 11/22/89).
- 11/30/89 131 Motion to appeal in forma pauperis filed
- 132 Motion to appeal in forma pauperis granted
- 133 Filed notice of appeal (Counts 1-4)
- 134 Filed letter re. jurisdictional statements.

- 12/05/89 136 Notice of appeal and docket entries transmitted to USCA (APPL#2) (Dkt'd 12/05/89).
- 10/18/91 180 Filed opinion of USCA (89-3639)
- 04/03/92 182 Filed copy of order granting leave to proceed in forma pauperis and the petition for writ of certiorari in the above-entitled case.

United States v. Alfonso Soto 89 CR 165-03

- 02/23/89 1 Filed magistrate complaint
- 03/02/89 24 Detention hearing held (MAGISTRATE JUDGE BUCKLO)
- 24 Preliminary examination held
- 24 Order finding of probable cause
- 24 Defendant held to the district court
- 24 Bail not allowed
- 03/21/89 31 Filed indictment
- 32 Bail not allowed (No bond set, detained by Magistrate.)
- 04/04/89 38 Defendant enters plea of not guilty (Counts 1,5-6)
- 04/25/89 45 Motion for severance/separate trial filed (Counts 1,5-6) (Motion to sever defendant Soto from defendant Garcia.
- 47 Motion to quash filed
- 47 Motion to suppress evidence filed

04/27/89 49 Motion for joinder filed (MOT#5) (To adopt pretrial motions of codefendants.)

05/05/89 55 Government's consolidated response to defendants' pretrial motions.

05/15/89 62 Request for an evidentiary hearing and reply to government's response to defendants' pretrial motion to suppress physical evidence acquired at 3517 W. 38th Street.

62 (Supplement to the previously filed motion to suppress physical evidence and request for an evidentiary hearing.)

62 Reply to government's responses to defendant's pretrial motions to suppress physical evidence and request for an evidentiary hearing.

07/11/89 66 Motion for joinder granted

66 Motion to suppress evidence denied

66 Order filed (Government is ordered to instruct its agents to preserve notes.)

66 Motion to quash denied

66 Motion for severance/separate trial denied

66 Motion for discovery/inspection denied

08/04/89 78 Order filed (For Judge Bua. Enter Report and Recommendation of Magistrate Bucklo regarding defendants' various motions to quash their arrests, to quash search warrant executed by the government in this matter, and to suppress evidence seized by the government

following defendants' arrests. All matters relating to the referral of this action having been resolved, this case is returned to the assigned Judge for further proceedings.

08/07/89 86 Motion made in open court to dismiss

86 Motion to dismiss denied

86 Motion made in open court for mistrial

86 Motion for mistrial granted

08/16/89 100 Jury verdict of guilty

100 Court judgment of guilty (Counts 1,5-6)

09/15/89 105 Motion for new trial filed (Counts 1,5-6)

105 Filed memorandum in support of motion for new trial

09/18/89 110 Motion for new trial denied

10/25/89 115 Motion to produce filed (Counts 1,5-6) (For production of Brady Material.)

116 Motion for judgment of acquittal filed (Counts 1,5-6)

117 Motion to appeal in forma pauperis filed

11/30/89 130 Filed appearance of CUNNIFF, KENNETH L as attorney for defendant

Attorney CUNNIFF, KENNETH L added to case

12/14/89 143 Motion to appeal in forma pauperis granted

145 Sentencing of defendant (Counts 1,5-6) (It is ordered that the defendant shall

pay to the United States a special assessment of \$150.00, which shall be due immediately. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS. IT IS ORDERED that the defendant to be given credit for time already served. Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.) (JUDGE BUA)

12/15/89 146 Filed notice of appeal (Counts 1,5-6) (From final judgment dated December 14, 1989.)
 147 Jurisdictional Statement.
 179 Filed certified copy of order from U.S. Court of Appeals affirming judgment of U.S. District Court
 180 Filed opinion of USCA
 12/12/91 181 Affidavit of Alfonso Soto with letters dated 11/5/91 and 12 4, 1991 attached.
 04/03/92 182 Filed copy of order granting leave to proceed in forma pauperis and the petition for writ of certiorari in the above-entitled case.

United States v. Salvador Garcia 89 CR 165-04

02/23/89 1 Filed magistrate complaint
 25 Detention hearing held

25 Order finding of probable cause
 25 Defendant held to the district court
 25 Bail not allowed
 03/21/89 31 Filed indictment
 32 Bail not allowed
 04/25/89 47 Motion to suppress evidence filed
 48 Motion to suppress evidence filed
 04/27/89 49 Motion for joinder filed (Counts 1,5) (To adopt pretrial motions of codefendants.)
 05/05/89 55 Government's consolidated response to defendants' pretrial motions.
 05/15/89 62 Request for an evidentiary hearing and reply to government's response to defendants' pretrial motion to suppress physical evidence acquired at 3517 W. 38th Street.
 62 (Supplement to the previously filed motion to suppress physical evidence and request for an evidentiary hearing.)
 62 Reply to government's responses to defendant's pretrial motions to suppress physical evidence and request for an evidentiary hearing.
 07/11/89 66 Motion for joinder granted (JUDGE BUA)
 66 Motion to suppress evidence denied
 66 Order filed (Government is ordered to instruct its agents to preserve notes.)
 66 Motion to quash denied

- 66 Motion for discovery/inspection denied
- 07/12/89 67 Order filed (Government is ordered not to destroy the contraband seized in this case until after the trial has been completed.)
- 07/13/89 68 Order filed (D.E.A. is ordered to preserve all drug evidence and contraband.)
- 08/04/89 78 Enter Report and Recommendation of Magistrate Bucklo regarding defendants' various motions to quash their arrests, to quash search warrant executed by the government in this matter, and to suppress evidence seized by the government following defendants' arrests. All matters relating to the referral of this action having been resolved, this case is returned to the assigned Judge for further proceedings.
- 08/07/89 86 Motion made in open court to dismiss
- 86 Motion to dismiss denied
- 86 Motion made in open court for mistrial
- 86 Motion for mistrial granted
- 08/16/89 101 Court judgment of guilty (Counts 1, 5)
- 11/28/89 128 Sentencing of defendant (Counts 1,5) (It is ordered that the defendant shall pay to the United States a special assessment of \$100.00, which shall be due immediately. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS. IT IS FURTHER ORDERED that defendant be given

credit for time already served. The Court makes the following recommendations to the Bureau of Prisons: that defendant be incarcerated at Oxford, Wisconsin. Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.) (JUDGE BUA)

- 12/06/89 138 Filed notice of appeal (Counts 1,5) (From final judgment dated November 28, 1989.)
- 12/07/89 Mailed letter re. jurisdictional statement.
- 10/18/91 179 Filed certified copy of order from U.S. Court of Appeals affirming judgment of U.S. District Court
- 180 Filed opinion of USCA
- 04/03/92 182 Filed copy of order granting leave to proceed in forma pauperis and the petition for writ of certiorari in the above-entitled case.
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF)	
AMERICA)	
v.	)	No. <u>89 CR 165</u>
	)	Violations: Title 21,
GLORIA ZAFIRO,	)	United States Code,
JOSE MARTINEZ,	)	Sections 841(a)(1) and 846
ALFONSO SOTO and)	
SALVADOR GARCIA)	

COUNT ONE

The SPECIAL MAY 1987 GRAND JURY charges:

1. On or about February 22, 1989, at Cicero and Chicago, in the Northern District of Illinois, Eastern Division,

GLORIA ZAFIRO,
JOSE MARTINEZ,
ALFONSO SOTO and
SALVADOR GARCIA,

defendants herein, conspired and agreed with each other and with other persons known and unknown to the Grand Jury knowingly and intentionally to distribute and to possess with intent to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, and heroin and marijuana, Schedule I Controlled Substances, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was part of the conspiracy that on or about February 22, 1989, defendants GLORIA ZAFIRO and JOSE MARTINEZ knowingly possessed approximately

7.25 kilograms of cocaine and \$23,000 cash in an apartment located on the second floor of the building at 1925 South 51st Court, Cicero, Illinois.

3. It was further part of the conspiracy that on or about February 22, 1989, defendant ALFONSO SOTO did meet with defendants GLORIA ZAFIRO and JOSE MARTINEZ at 1925 South 51st Court, Cicero, then travelled from that location to the alley behind the house and garage located at 3517 West 38th Street, Chicago, Illinois.

4. It was further part of the conspiracy that on or about February 22, 1989, defendant ALFONSO SOTO met with defendant SALVADOR GARCIA in the alley behind 3517 West 38th Street, Chicago, and with him entered the garage at the address, where they were storing approximately 28.5 kilograms of cocaine.

5. It was further part of the conspiracy that on or about February 22, 1989, defendants ALFONSO SOTO and SALVADOR GARCIA knowingly took approximately 25 kilograms of cocaine from the garage at 3517 West 38th Street, Chicago, and transported it to 1925 South 51st Court, Cicero, where defendants GLORIA ZAFIRO and JOSE MARTINEZ were waiting for the cocaine in the second floor apartment.

6. It was further part of this conspiracy that defendants GLORIA ZAFIRO, JOSE MARTINEZ, ALFONSO SOTO, SALVADOR GARCIA, and their co-conspirators misrepresented, concealed and hid, and caused to be misrepresented, concealed and hidden the purposes of and acts done in furtherance of the conspiracy, and used surveillance, counter-surveillance techniques and other means to avoid detection by law enforcement authorities

and otherwise to provide security to members of the conspiracy;

In violation of Title 21, United States Code, Section 846.

COUNT TWO

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Cicero, in the Northern District of Illinois, Eastern Division

GLORIA ZAFIRO and
JOSE MARTINEZ,

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 7.25 kilograms of a substance and mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Cicero, in the Northern District of Illinois, Eastern Division

GLORIA ZAFIRO and
JOSE MARTINEZ,

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 25 grams

of a substance and mixture containing heroin, a Schedule I Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Cicero, in the Northern District of Illinois, Eastern Division

GLORIA ZAFIRO and
JOSE MARTINEZ,

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 1.75 kilograms of a substance and mixture containing marijuana, a Schedule I Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIVE

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Cicero, in the Northern District of Illinois, Eastern Division

ALFONSO SOTO and
SALVADOR GARCIA,

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 25 kilograms of a substance and mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT SIX

The SPECIAL MAY 1987 GRAND JURY further charges:

On or about February 22, 1989, at Chicago, in the Northern District of Illinois, Eastern Division

ALFONSO SOTO

defendants herein, knowingly and intentionally possessed with intent to distribute approximately 3.5 kilograms of a substance and mixture containing cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ illegible
FOREPERSON

/s/ illegible
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

(Caption Omitted In Printing)
(Certificate Of Service Omitted In Printing)

GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT'S PRETRIAL MOTIONS

The United States of America, by its attorney, ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, hereby responds to pretrial motions filed on behalf of defendants Gloria Zafiro, Jose Martinez, Alfonso Soto and Salvador Garcia. Because some of these motions overlap, the government will respond by category.

Discovery Motions

Defendants Soto and Garcia filed a 23-page discovery motion with a 19-page supporting affidavit. They ask for discovery in 16 categories, each category containing up to 20 separate demands for discovery. Many of the categories of discovery requested are not even argued in the supporting memorandum *e.g.*, Soto and Garcia's request that this Court order production of grand jury attendance lists and transcripts of colloquy between government attorneys and the grand jury (p.15); their request for an order requiring production of results of tests and reports (p.3); and their request for an order requiring production of documents and objects by the government as well as specific instances of conduct under Rule "608(d)", Federal Rules of Criminal Procedure. Defendants also want

an order for production of home addresses of government agents and a list of "all persons who the government may or may not call in presentation of its case-in-chief" (p.16). Such requests are so far beyond the pale of discovery that the government has difficulty framing an appropriate response.

Many of the items demanded in this motion have already been produced or do not exist, as defendants already know from the Government's April 1, 1989 discovery letter (see Appendix A). In reading this motion, one would think that the Court-ordered discovery conference had never taken place. The government responds that it has met, is meeting and will continue to meet its pretrial discovery obligations in a timely fashion in all matters, including disclosure of documents and physical evidence, results of test when they are complete, and any disclosure that may be required under *Brady* or *Giglio*, if such material exists. With the exceptions noted below, the government objects to the shotgun approach of this word-processing brief and moves that it be stricken as a violation of this Court's Rule Number 2.04.

Discovery of the Informant's Identity.

Soto and Garcia move for discovery of the identity of any confidential informants used by the government in this case, as well as 19 other types of information about any such people.

The government acknowledges that a confidential informant (CI) acted as a tipster in this case. As set forth in paragraphs 2 and 3 of the February 22, 1989 affidavit of Task Force Agent Thomas Bridges, on February 15, 1989,

a CI identified Jose Martinez and Gloria Zafiro as two persons living at 1925 South 51st Court, Cicero, Illinois who were then and there expediting the delivery of multi-kilogram load of cocaine. On the basis of this information, government agents undertook the other acts set forth in the affidavit which ultimately led to the arrest of all four defendants and the application for and granting of a search warrant for 1925 South 51st Court. See Appendix B.

Roviaro v. United States, 353 U.S. 53 (1957) sets forth a balancing test for courts to use in deciding whether to order disclosure of an informant's identity. In a recent application of the test in *United States v. Fakhoury*, 819 F.2d 1415, 1424-25 (7th Cir. 1987), the Court of Appeals for the Seventh Circuit noted that where an informer is a "mere tipster," it will rarely be appropriate to disclose his identity; in the *Fakhoury* case, the Court followed this rule, holding that there was no need to disclose the informant's identity when the informant did not testify at trial, but simply provided information that initiated the investigation. *Id.* (citation omitted).

Similarly, in this case a reliable informant acted as a tipster to the Drug Task Force. At this time the government has no intention of calling the informant as a witness at trial. Knowing the informant's identity would not aid any defendant's defense, but would only compromise a productive informant who is serving the public's interest by providing information necessary to apprehend those who have committed crimes. Soto and Garcia's motions to disclose the informant's identity should be denied.

Request for a Witness List

Defense attorneys are not entitled to Government Witness Lists as part of pretrial discovery. *United States v. Bouye*, 688 F.2d 471, 473-74 (7th Cir., 1982) (Citations omitted). Defendant Soto has indicated that he will present an alibi defense, but has not provided his list of witnesses within ten days of the request as required by Rule 12.1(a), Federal Rules of Criminal Procedure. Unless the government is provided with this list sufficiently in advance of trial to perform any necessary investigation, the government would be forced to move either for a continuance or to prohibit testimony from Soto's alibi witness. Once such a list is provided, the government will comply with its disclosure obligations under Rule 12.1(b).

Request for 608(b) Evidence

Nothing under Rule 16, Federal Rules of Criminal Procedure allows a defendant to discover what, if any, evidence the government may use to impeach defense witnesses. *Cf. United States v. Cerro*, 775 F.2d 908, 914-15 (7th Cir. 1985) (in context of a pretrial discovery order applicable to defendant, the appellate court noted that "there is a serious question whether a district judge is empowered to require discovery of impeachment evidence.") If and when any defense witness takes the stand, then the question of whether a particular line of questioning is appropriate becomes ripe. It is not an appropriate area of pretrial discovery, and this motion should be denied.

Defendant's Suppression Motions

All four defendants have moved to quash their arrests and suppress evidence taken from them personally, from the apartment at 1925 South 51st Court, Cicero, and from the house and garage at 3517 West 38th Street, Chicago. These motions should be denied.

Facts

As set forth in more detail in the search warrant affidavit, on February 15, 1989, a confidential informant told a task force agent that defendants Gloria Zafiro and Jose Martinez lived at the second floor apartment at 1925 South 51st Court, Cicero, Illinois, and that they were at that time expecting a large shipment of cocaine. This informant had been 100% accurate on at least five previous tips. Agents verified that telephone bills were sent to J. Martinez at that address, and that the electric bill was sent to Gloria Zafiro. The building at 1925 South 51st Court, Cicero, is a two flat with a common front porch entrance door that is unlocked. A locked door to the right leads to the first floor apartment. A doorless doorway to the left leads to a set of stairs that leads to a locked door at the top of the stairway. This second story locked door leads into the second story apartment. On February 21, 1989 a young male Latin was observed leaving the targeted apartment carrying a blue gym bag, furtively glancing about, then driving circuitously to another residence in Cicero to which he delivered the gym bag. This man then returned to the Zafiro/Martinez apartment, picked up a large black box, and drove off circuitously, so that

surveillance agents were unsuccessful in following him, losing him in traffic.

The next day, agents observed defendant Soto drive up in front of the 1925 South 51st Court building, look up and down the street, then go up the stairs toward the Zafiro/Martinez apartment on the second floor. About ten minutes later Soto descended, and drove off, following a circuitous route. Soto ended up at 3517 West 38th Street in Chicago, a single family dwelling with an unattached garage at the rear. Task Force agents were familiar with this dwelling from previous investigations; that is, other persons being investigated for alleged narcotics activity had either lived at or visited this same house in the past. No previous searches or arrests had take [sic] place at this residence.

When Soto arrived, he drove down the alley toward the unattached garage at 3517 West 38th Street. There, Salvador Garcia joined him in the alley, and both men went into the garage. They returned to the alley carrying a large, long, and apparently heavy cardboard box that they put in the trunk of Soto's car. Soto and Garcia entered the car and Soto drove back to 1925 South 51st Court in Cicero, again in a very circuitous manner. Task Force agents were then aware that circuitous driving is a common technique used during drug transactions because it affords the driver a good chance to identify cars that are "tailing" him and a good chance to lose any tail cars, whether he has identified them or not (be they law enforcement or other persons with knowledge of and interest in any narcotics or money that may be present).

Once parked on 51st Court, Soto and Garcia removed the cardboard box from the trunk, and walked toward 1925. While walking, they glanced furtively up and down the street. This was not just a traffic check, it was the most common-sense way for couriers to see whether unknown persons were watching or approaching them. When Soto and Garcia got to the doorway leading to the stairs to Zafiro's apartment, two task force agents approached them and identified themselves as law enforcement officers.¹ Upon seeing the task force agents, Soto and Garcia dropped the box, which broke open when it hit the floor, and ran up the stairs. The two agents saw then that the box contained wrapped packages that to them looked liked [sic] kilograms packets of cocaine. The agents chased Soto and Garcia up the stairs and found them in Zafiro and Martinez's apartment, where Zafiro and Martinez were also present.

Agents arrested all four people and secured the premises. Documents were seized from the persons of all four defendants incident to their arrest. One agent seized a package out of the abandoned box down in the public stairwell, saw that it did indeed look and feel like cocaine, so he field-tested it. The test was positive for presence of cocaine. The box contained about 25 kilograms of cocaine in 27 packages.

¹ In Paragraph 8 of the Search Warrant Affidavit, Detective Bridges states that there was a doorway on the first floor leading to the staircase, and this door then opened. Detective Bridges was wrong. There was no door on the first floor doorway. The door was onto the porch, not into the stairwell. bridges misunderstood what he was told by the agents who approached Soto and Garcia.

A group of agents drove to 3517 West 38th Street in Chicago whence Soto and Garcia had obtained this box of cocaine. There they met a woman who identified herself as Belen Soto, a cohabitant of the house with her husband, defendant Alfonso Soto. Task Force Agent Lupe Rodriguez conducted the conversation with Mrs. Soto in Spanish. Mrs. Soto was not arrested or threatened with arrest, no guns were drawn. Rodriguez asked her if the agents could search the house and the garage. Rodriguez told Mrs. Soto that she did not have to consent. Mrs. Soto agreed to the search. The agents did not have a Spanish language consent to search form with them, so Rodriguez translated an English form orally for Mrs. Soto. She then signed the consent to search form. See Appendix C.

Agents searched the house and the garage. In the house, agents found an Ohaus triple beam scale. In the garage, agents saw a Ford Probe automobile. An agent then used a car key taken earlier from Alfonso Soto to open the car's trunk. In it, he found a blue duffle bag. Agents looked inside the duffle bag and found approximately 3.5 kilograms of cocaine wrapped in four packages.

Thereafter, one of the agents, Detective Thomas Bridges, came to the federal building to prepare an affidavit for a search warrant for the Zafiro-Martinez apartment on South 51st Court in Cicero. Because of time constraints, Bridges' handwritten affidavit was presented to Magistrate Balog at about 4:50 p.m. that afternoon. A verbatim typed transcription has since been prepared for use in these proceedings. Magistrate Balog issued the warrant that afternoon and agents searched the apartment. In a suitcase in a bedroom closet, agents found

about 7.25 kilograms of cocaine, one ounce of brown heroin and about four pounds of marijuana. In a knapsack in a closet, agents found about \$23,000 in cash. Certain documents and papers were also seized during the search.

Motions to Quash Arrests

All four defendants have moved to quash their arrests and to suppress evidence seized incident to those arrests. These motions should be denied because there was probable cause to arrest all four defendants, as well as exigent circumstances justifying the agents entry into Zafiro and Martinez's apartment.

Law enforcement agents may arrest a person without a warrant if the information available to the agents at the time of the arrest indicates that that person has committed a crime. *Bevier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986). "Probable cause is a function of information and exigency." *Id.* at 127, citing *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985). Probable cause is a "fluctuating concept" dependent on factual and practical considerations of everyday life. *Id.* at 126, quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Probable cause is determined by considering the totality of the circumstances. *Id.* It requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity; law enforcement agents have probable cause to arrest a person where the facts and circumstances within their knowledge, based on reasonably trustworthy information, are sufficient to cause a prudent person to believe that the persons arrested were committing an offense.

United States v. Lima, 819 F.2d 687, 688 (7th Cir. 1987) (citations omitted). In the contest of a civil suit, the Seventh Circuit has noted that "if the police have probable cause, the arrest is lawful; and they have probable cause if they believe, with reason, that their informant was telling the truth." *McKinney v. George*, 726 F.2d 1183, 1187 (7th Cir. 1984).

Here, an unerring confidential informant supplied task force agents with two names, an address, a time frame, and the general type and amount of the transaction. Agents corroborated this information with personal observations, set forth above. In sequence, agents collectively learned that Zafiro and Martinez did live where the CI said; they saw an unknown man visit them and leave, engaging in countersurveillance driving; they saw Soto arrive and leave, engaging in countersurveillance driving; they observed Soto drive to a house with which agents had had previous contact in other narcotics investigations; they watched Soto and Garcia engage in countersurveillance driving when they returned to Zafiro and Martinez's apartment with the large heavy box; they saw both men looking furtively as they carried the box; they saw both men flee from agents who approached them and identified themselves as law enforcement agents;² and they saw what appeared to be packages of cocaine in the broken box as they chased Soto and Garcia up the stairs into Martinez and Zafiro's apartment.

² Flight can be strong evidence of guilt. *United States v. Lima*, 819 F.2d at 689 (citations omitted).

Under the totality of facts and circumstances known to them at that time, the agents clearly had trustworthy information to believe that Soto and Garcia were delivering a large load of cocaine to Zafiro and Martinez, just as the informant had told them. The agents thus were justified in arresting all four defendants.

Arresting Zafiro and Martinez in their home was justified because exigent circumstances clearly required entry into the apartment without taking time to obtain arrest warrants. Agents were in hot pursuit of fleeing felons who were then and there committing a major felony, namely cocaine distribution. Agents had to pursue Soto and Garcia into the apartment and arrest all four defendants because if they had not, it is a virtual certainty that all four defendants would have fled and equally likely that the defendants would have removed or destroyed the narcotics and papers stashed in the apartment. These are exactly the circumstances under which warrantless arrests in the home are allowed. *E.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 749-53; *United States v. Altman*, 797 F.2d 514, 515 (7th Cir. 1986). Having interrupted the delivery of over 50 pounds of cocaine by identifying themselves as police officers, the agents had a duty to prevent the distributors from escaping and to prevent from alerting Zafiro and Martinez so that they could destroy evidence and then escape. Had agents waited outside until a warrant was obtained, any contraband in the apartment would have been rinsed or flushed down the pipes and any documents burned long before any entry and arrest could have taken place. The entry was lawful because of these exigent circumstances.

Once the agents had arrested the defendants, they had a legal right to conduct an incidental search. *E.g.*, *United States v. Queen*, 847 F.2d 346, 352 (7th Cir. 1988). Documents taken from each of these defendants was taken after a lawful arrest and therefore cannot be suppressed.

The Consent Search at 3517 West 38th Street

The search of the house and garage were pursuant to consent given by a co-occupant, Mrs. Belen Soto. A search conducted pursuant to valid consent is an exception to the requirement of a warrant or probable cause. *United States v. Marin*, 761 F.2d 426, 433 (7th Cir. 1985), citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The consent must be voluntary, and it must be given by a person with common authority to consent to the search. *Id.*, citing *United States v. Matlock*, 415 U.S. 164, 171 (1974).

Here, there is no real question that Mrs. Soto is married to defendant Alfonso Soto and that on February 22, 1989, she lived at 3317 West 38th Street. This gave her common authority over the house and garage. *E.g.*, *United States v. Marin*, 761 F.2d at 433; *United States v. Sealey*, 830 F.2d 1028, 1031 (9th Cir. 1987).³

³ Salvador Garcia has moved to suppress evidence taken from 3517 West 38th Street, claiming that he lives there. The government has no knowledge of Garcia's occupancy of the house. He has no standing to suppress the cocaine taken from its garage. In any event, Mrs. Soto was and is an occupant with authorize the search that was undertaken.

Under the totality of the circumstances, Mrs. Soto's consent was voluntary. Among the circumstances to consider are Mrs. Soto's age, education, apparent intelligence, whether she was in custody, whether the requests were repeated or prolonged, whether she was advised she did not have to consent, whether the request was subtly coercive, and whether Mrs. Soto was in a vulnerable subjective state. *E.g.* *United States v. Rojas*, 783 F.2d 105, 109 (7th Cir. 1986) (citations omitted). Here, Mrs. Rojas was an intelligent adult who spoke coherently with agent Rodriguez about the search. There was no language barrier. She was not under arrest, nor threatened with arrest, nor subjected to any intimidation in the form of drawn guns, large groups of agents, or loud voices. Rodriguez advised Mrs. Soto that she did not have to consent. Rodriguez translated an English consent form for Mrs. Soto, which she then signed. Although she knew her husband was in custody, there was not indication that she was upset to the point of not understanding what she was doing. See *United States v. Marin*, 761 F.2d at 434. See also *United States v. Rojas*, 783 F.2d at 109-110, in which defendant's consent to search was held voluntary when he had a slight language barrier, was under arrest, handcuffed, and placed in the smallest room in his apartment prior to consenting. Here, Mrs. Soto [sic] consent was clearly given voluntarily.

The scope of the consent search included the garage. "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *United States v. White*, 706 F.2d 806, 808 (7th Cir.

1983) quoting *United States v. Ross*, 456 U.S. 798, 820 (1984). This would include a sealed container such as the trunk of a car in the garage for which Mrs. Soto had given consent to search. Mrs. Soto knew that agents were searching in the garage but did not object to or limit that search in any manner. This constitutes continued consent. E.g. *United States v. Sierra-Hernandez*, 581 F.2d 760, 764 (9th Cir. 1978) cert. denied, 439 U.S. 936 (1978). Therefore, the cocaine seized from the automobile, as well as the triple-beam scale found in the house were properly discovered and seized. They are admissible at trial as evidence of the conspiracy.

The Search at 1925 South 51st Court

Defendants motions to suppress evidence taken from 1925 South 51st Court in Cicero should be denied. Evidence seized from that apartment, namely documents, cash and narcotics, were all discovered during a search authorized by a warrant issued that day by a federal magistrate. In reviewing the issuance of this warrant, this Court should uphold Magistrate Balog's decision "so long as he had a substantial basis for concluding that a search would uncover evidence of wrongdoing." *United States v. Griffin*, 827 F.2d 1108, 111 (7th Cir. 1987) quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983). In independently reviewing the sufficiency of the affidavit, this Court should apply the principle that "doubtful cases should be resolved in favor of upholding the warrant." *Id.* (citations omitted).

Here, the affiant supplied information in support of a request to search the Zafiro/Martinez apartment for

narcotics, narcotics residue and paraphernalia, documents, records, photographs and money.⁴ The information provided by Detective Bridges in his affidavit, read as a whole, in the realistic and common sense manner, alleged enough specific facts and circumstances from which Magistrate Balog could reasonably conclude that money, records, paraphernalia or more drugs were associated with the crime and located at the Zafiro/Martinez apartment. See *United States v. Griffin*, 827 F.2d at 1111, quoting *United States v. Pritchard*, 745 F.2d 1112, 1120 (7th Cir. 1984).

Here, a reliable informant had told agents that Zafiro and Martinez were expecting delivery of a large shipment of cocaine at the apartment. Martinez and Zafiro were present in the DEA's NADDIS computer as associates in a heroin smuggling organization. Officers caught Soto and Garcia in the act of delivering 25 kilograms of cocaine to this address. Both men fled into Zafiro and Martinez's apartment. One day before, an unknown man had exchanged parcels at this apartment while engaging in countersurveillance driving. On February 22, 1989, two other men entered and left the apartment an hour before Soto first arrived on the scene. All of this evidence taken together supports the conclusion that there was probably

⁴ Defendant Martinez moves to quash the warrant on the grounds that although the caption and affidavit clearly and correctly name Cicero as the town in which the Zafiro/Martinez apartment is located, the body of the warrant incorrectly states that Chicago is the city. Where, as here, there was no doubt in the affiants or the magistrate's mind as to the location to be searched, a scrivener's error cannot defeat the warrant. See *United States v. Bentley*, 825 F.2d 1104, 1109 (7th Cir. 1987).

money and documents in the apartment, and probably other drugs as well. The evidence indicated first, that some sort of delivery or exchange had taken place a day before, and second, that Zafiro and Garcia were expecting a cocaine delivery of exactly the sort that Soto and Garcia were caught making. It was highly likely that money or records relating to one or both of these deliveries would be found in the Zafiro/Martinez apartment. Under the standards set forth in *Griffin*, this court should uphold the issuance of the search warrant and deny defendants' motions to suppress evidence seized as a result of it.

The Box of Cocaine

The box containing approximately 25 kilograms of cocaine was seized in a public area with its contents in plain view after Soto and Garcia had abandoned it but before they were arrested. Both the plain view doctrine and the abandoned property doctrine are exceptions to the warrant requirement of the Fourth Amendment. Therefore, the seizure of this box without a warrant was lawful.

Police may seize an item without a warrant under the plain view doctrine if their presence in the area is lawful, the discovery is inadvertent, and the criminal nature of the item is immediately apparent. *United States v. Diaz*, 814 F.2d 454, 460 (7th Cir.), *cert. denied*, ___ U.S. ___ 108 S.Ct. 166 (1987) (citations omitted). Here, the agents were in the public entryway/stairwell of a two-flat apartment building. They saw the cocaine packages in the cardboard box only after Soto and Garcia had dropped the box, causing it to break. The agents immediately recognized

the packages to be cocaine (an observation corroborated by the circumstances of the investigation that morning). Thus, all three criteria are met and the search was lawful under the plain view doctrine.

Further, the agents had a right to seize the box and its contents because Soto and Garcia abandoned it. When individuals abandon property, they forfeit any expectation of privacy they might have had in it; therefore, a warrantless search of such property is not unreasonable under the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 241 (1959); *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983), *cert. denied*, 464 U.S. 859 (1983); *Cf. United States v. Herrera* 757 F.2d at 147 (discarded garbage may be searched without warrant because there is no legitimate expectation of privacy). The existence of police pursuit or investigation at the time of abandonment does not of itself render the abandonment involuntary. *United States v. Jones*, 707 F.2d at 1172. The test for abandonment is an objective determination based on words spoken, acts done and other facts as to whether the individual has retained any reasonable expectation of privacy in the object. *Id.*

Here, when agents approached Soto and Garcia in the public area of an apartment building and simply identified themselves as police, Soto and Garcia dropped the box so fast that when it hit the floor it broke. Both men raced up the stairs without talking to police, and without securing their box in any way from other members of the public who might enter the stairwell area of the building. All circumstances point toward a quick and complete relinquishment of any and all proprietary interests in the box.

Indeed, this denial of ownership continues in Soto and Garcia's pretrial motions. Each avers that the box belonged to the other. If neither claims prior ownership of the box and its contents, neither has standing to move to suppress it at trial. *E.g.*, *United States v. Herrera*, 757 F.2d at 147, citing *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980).

Under all three of the analyses set forth, the conclusion is the same: defendant's motions to suppress the box and its contents from evidence should be denied., [sic]

Defendants Soto's and Garcia's Motions to Sever

Defendants Soto and Garcia have filed virtually identical motions for severance, each disclaiming any possessory interest in the box of cocaine they both carried and each denying any knowledge of its contents. Soto says it was Garcia's box, Garcia says it was Soto's.

This court may grant a severance under Rule 14, Federal Rules of Criminal Procedure if defendants assert mutually antagonistic defenses, that is only when acceptance of one defendant's position precludes acquittal of the other defendant. *United States v. Turk*, No. 88-1171 and 1172 (7th Cir. March 22, 1989), slip. op. at 4 (citations omitted). There is a strong public interest in having persons jointly indicted tried together, especially where the evidence against the defendants arose out of the same series of acts. *Id.* (citations omitted). "Fingerpointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.), cert. denied, 108 S.Ct. 67 (1987). "Joint trials

reduce the chance that each defendant will try to create a reasonable doubt by blaming an absent colleague, even though one or the other (or both) undoubtedly committed a crime. The joint trial gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome . . . Inconsistent defenses may also create prejudice. But as a rule, evidence and arguments may be controlled by the court, and inconsistent defenses are not enough to require severance." *Id.* (citations omitted). See also *United States v. Novak*, Nos. 88-2562 and 88-2563 (7th Cir. March 29, 1989), slip. op. at 16-17 ("defendant carries the burden of establishing actual prejudice to the extent that a fair trial could not be had jointly with the other defendant"). In *Novak*, codefendants Novak and Leon were arrested together at the Milwaukee airport after they had flown together from Florida. Leon was carrying a dufflebag with cocaine in it. They were tried together, despite Novak's motion for a severance on the ground that he was claiming no knowledge that Leon's bag contained cocaine. Leon, who did not request severance, defended himself as a nonparticipant: some third party put the cocaine in his bag. Leon testified at trial, however, that Novak had told him that he (Novak) was a cocaine peddler. *Id.* The court of appeals held that "a joint trial was clearly appropriate." *Id.* at 17.

Here, there is nothing in the record to indicate that a severance should be granted. First, neither Soto nor Garcia has testified under oath or submitted a sworn affidavit to show either that they actually will testify, or what the contents of that testimony will be. The proffer by the attorneys is not enough. Second, if the testimony

of each defendant is simply that the box was not his, it was the other guy's, this is not enough for a severance. Absent sworn testimony from Garcia that Soto indicated to Garcia he was aware of the contents of "his" box, and sworn testimony from Soto that Garcia indicated to Soto he was aware of the contents of "his" box, there is nothing irreconcilable about their defenses. Both are claiming not to know what was in the box. The jury could, for example, believe Soto's testimony that he was helping Garcia carry a box, and still acquit Garcia because there was insufficient evidence that Garcia knew what was in the box, and therefore could not be found guilty of knowingly and intentionally distributing anything. The jury could reverse the scenario and also acquit them both. In either event, the defenses are not mutually antagonistic to the point of requiring severance.⁵ Nothing offered by either defendant *precludes* acquittal of the other. See *United States v. Buljubasic*, 808 F.2d at 1263. Severance is not appropriate at this time, and in the government's view, never will be. The joint trial gives the jury the best perspective on the evidence and therefore increases the likelihood of a correct verdict. *Id.* Both motions for severance should be denied.

⁵ Clearly, if Soto and Garcia both testify as proffered by their respective attorneys, at least one of them has to be lying. The government's position is that they are both lying because they were in joint, knowing possession of the cocaine as coconspirators with Zafiro and Martinez. Garcia and Soto are simply playing games with this Court, the Rules of Criminal Procedure, and the truth in an attempt to gain a perceived tactical advantage for both of them at trial. See *United States v. Buljubasic*, 808 F.2d at 1263.

Conclusion

For the reasons stated above, defendant's pretrial motions should be denied.

Respectfully submitted,

ANTON R. VALUKAS
United States Attorney

BY: /s/ Stephen Crocker
STEPHEN CROCKER
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

ORDER

Following their indictment on drug conspiracy charges, defendants Gloria Zafiro, Jose Martinez, Alfonso Soto, and Salvador Garcia have filed a variety of pretrial motions. This court cannot decide some of defendants' motions without first resolving certain factual disputes. For this reason, the court has instructed Magistrate Bucklo to conduct an evidentiary hearing concerning defendants' motions to quash certain arrests, quash a search warrant, and suppress certain evidence seized by government agents. Having referred these motions to the magistrate, the court will now rule on the remainder of defendants' motions.

I. Motions to Adopt

Martinez, Soto, and Garcia have moved to adopt the pretrial motions of their codefendants. To the extent that any defendant's motion applies to any or all codefendants, the court grants the three defendants' motions to adopt.

II. Discovery Motions

Pursuant to Fed. R. Crim. P. 16, Martinez moves for disclosure of all statements that the government seeks to attribute to him. The government responds that it has

satisfied and will continue to satisfy its obligations under Rule 16. Based on the government's representations, this court denies Martinez's discovery motion.

In addition to Martinez's request for disclosure, Soto and Garcia have filed a 23-page discovery motion. They seek to discover a wide assortment of documents and information. Without addressing every aspect of the lengthy motion filed by Soto and Garcia, the government asserts that it has fully complied with the discovery requirements imposed by Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The government also points out that several of the requests made by Soto and Garcia fall outside the scope of Rule 16. Specifically, the government objects to defendants' requests for the identity of confidential informants, a list of government witnesses, and evidence in the government's possession that tends to impeach defense witnesses.

The government acknowledges that it relied on a tip from a confidential informant when it initiated its investigation of defendants. Nonetheless, the government insists that it should not have to disclose the identity of its confidential informant. This court agrees with the government's position. The government has indicated that it does not intend to call the informant as a witness at trial. Moreover, the informant did not witness any of the crimes with which defendants are charged; he merely provided the tip that launched the investigation. Thus, disclosure of the informant's identity will not appreciably assist defendants in preparing for trial. Under these circumstances, the government's interest in maintaining the confidentiality of its informant's identity outweighs

defendants' need for disclosure. See *United States v. Fakhoury*, 819 F.2d 1415, 1424-25 (7th Cir. 1987), cert. denied, 108 S. Ct. 749 (1988).

The government has also balked at defendants' request for a list of prospective government witnesses. As the government notes, the Federal Rules of Criminal Procedure do not entitle a defendant to a list of prospective witnesses. *United States v. Bouye*, 688 F.2d 471, 473-74 (7th Cir. 1982). Consequently, this court will not require the government to produce such a witness list. Of course, once Soto supplies the government with a list of witnesses who will testify in support of Soto's alibi defense, the government will have to provide Soto with a list of witnesses who will tend to rebut Soto's alibi. See Fed. R. Crim. P. 12.1(a), (b).

The government's final objection concerns defendants' request for evidence tending to impeach defense witnesses. The Federal Rules of Criminal Procedure do not require the government to disclose impeachment evidence. In fact, according to the Seventh Circuit, "there is a serious question whether a district judge is empowered to require discovery of impeachment evidence" by federal criminal defendants. *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985). Because this court lacks clear authority to mandate discovery of impeachment evidence, the court will not order the government to disclose such evidence in the instant case.

For the most part, the government appears to have complied with defendants' reasonable discovery requests. Nonetheless, the government has not indicated whether it has instructed its agents to preserve the notes they made

while investigating defendants. Given the government's silence on this issue, the court will enter an order directing the government to take steps to preserve its agents' notes. In all other respects, however, the court denies the discovery motion filed by Soto and Garcia.

III. Motions to Sever

Shortly before making arrests in this case, government agents accosted Soto and Garcia while the two defendants were carrying a box into the building where Zafiro and Martinez reside. When the government agents identified themselves, Soto and Garcia dropped the box and fled to the apartment occupied by Zafiro and Martinez. The government later determined that the box contained cocaine. At trial, Soto and Garcia intend to point accusatory fingers at each other. Each defendant claims that he did not own the box or know its contents. Each defendant also asserts that he was simply helping to carry the box at the request of the other defendant. Soto and Garcia characterize their trial strategies as "mutually antagonistic defenses." Based on this characterization, both defendants have moved to sever their cases from each other pursuant to Fed. R. Crim. P. 14.

A court should resort to severance only when the defenses of multiple defendants would produce inevitable prejudice in the context of a joint trial: "Unless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants, it is not necessary to hold separate trials." *United States v. Buljubasic*, 808

F.2d 1260, 1263 (7th Cir.) (emphasis in original), *cert. denied*, 108 S. Ct. 67 (1987). The circumstances that might warrant severance do not exist in the instant case. In evaluating the government's case against Soto and Garcia, a jury could accept the defense offered by one defendant while concluding that the government did not sufficiently establish the guilt of the other defendant. For this reason, the court does not regard the defenses asserted by Soto and Garcia as mutually antagonistic. The court acknowledges that a joint trial will probably produce a strategic conflict between Soto and Garcia. Nonetheless, "[f]inger-pointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact." *Id.* For all their "finger-pointing", Soto and Garcia do not plan to assert mutually antagonistic defenses. Therefore, the court denies the two defendants' motions to sever.

CONCLUSION

For the foregoing reasons, the court grants the motions to adopt filed by Martinez, Soto, and Garcia. The court also orders the government to instruct its agents to preserve the notes they made while investigating defendants. In all other respects, however, the court denies defendants' discovery motions. Finally, the court denies the motions to sever filed by Soto and Garcia.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
 Nicholas J. Bua
 Judge, United States District Court

Dated: July 11, 1989

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

(Caption Omitted In Printing)

REPORT AND RECOMMENDATION

Gloria Zafiro, Jose Martinez, Alfonso Soto, and Salvador Garcia were arrested and charged with conspiracy to distribute and possess approximately 33.5 kilograms of mixtures containing cocaine, in violation of 21 U.S.C. § 846.¹ The defendants have filed various motions to quash their arrests, to quash a search warrant executed by the government in this matter, and to suppress evidence seized by the government following the defendants' arrests. This matter has been referred to me for a report and recommendation on defendants' motions, and an evidentiary hearing was held on August 3 and 4, 1989.

Facts

At the hearing, the government primarily relied on the testimony of Chicago Police Lieutenant Maurice Dailey, a supervisor with the joint Drug Enforcement Administration/Chicago Police Department Task Force with 14-15 years experience in narcotics investigations. He testified that on February 15 or 16, 1989, drug task force Agent Lupe Rodriguez, a Chicago police detective, was told by a confidential informant that Jose Martinez and

¹ A subsequent indictment has charged the four defendants with six counts of conspiracy to distribute and possession with intent to distribute various controlled substances.

Gloria Zafiro were expecting a multi-kilogram shipment of heroin and cocaine that would arrive at their residence at the second floor apartment of 1925 South 51st Court, Cicero, Illinois. This particular informant had provided drug task force agents with information on at least three previous occasions, and on each of these occasions, narcotics had been seized and arrests had been made based on the informant's information.

After hearing from the informant, drug task force agents checked Illinois Bell Telephone Company records, and learned that the telephone subscriber on the second floor of 1925 South 51st Court in Cicero was either a J. Martinez or Jose Martinez. In addition, agents checked Commonwealth Edison records, and learned that the electric service on the second floor was in the name of Gloria Zafiro.

Based on this information, drug task force agents began periodic surveillance of the 1925 South 51st Court building on February 17 or 18, 1989. The building, a brick two-flat, has five concrete steps that lead to a porch. At the back of the porch, there is a doorway leading into the apartment, with an outer aluminum-frame storm door with a glass panel on the upper half that opens out toward the porch, and an inner wooden door with a diamond-shaped glass panel that opens into a small hallway. At the right end of the small hallway, immediately to the right of the doorway, there is a locked door to the first floor apartment. To go to the second floor apartment, a person entering must go to the left around the wooden door which when open to a 90 degree angle blocks all but a few inches of the path to the stairs. The stairs climb about five or six steps to a landing, then turn and rise to a

locked door that leads into the second floor apartment. Officer McDermott, who was observing the front of the building for the task force, testified that the inner wooden door remained open during the time he was observing the building, so that through the glass panel of the storm door he could see whether a person was coming from or going to the second floor apartment. His testimony was corroborated in part by Ms. Lara, the sister of Ms. Zafiro, who testified that because her sister living upstairs had no key to the downstairs wooden door, it generally remained open during the day.

Lieutenant Dailey also testified that he had received information that when a Ford Bronco was seen near the Cicero residence, the shipment would soon arrive. Lieutenant Dailey testified that either the evening of February 21 or the morning of February 22, he was told by one of his agents that the Bronco had been seen, and by the morning of February 22, 1989, he had assigned eight officers to full-time surveillance of the 1925 South 51st Court building.

That morning, at approximately 11 a.m., agents observed a man later identified as defendant Alfonso Soto park a maroon Buick in front of the 1925 South 51st Court apartment, and look up and down the street before entering the building and then the second floor apartment. About ten minutes later, he left the apartment and drove in a circuitous manner to the alley behind 3517 West 38th Street, Chicago. Lieutenant Dailey testified that by "circuitous," he meant that Mr. Soto often retraced his path, went back and forth on various streets, and stopped on the side of the road and looked around as if checking for anyone following. Lieutenant Dailey testified that

such driving was typical of that used in drug transactions. Lieutenant Dailey also said that he was familiar with the 3517 West 38th Street residence from previous investigations involving narcotics trafficking during the past 11 years. After Mr. Soto parked behind the garage at 3517 West 38th Street, he was joined by another male hispanic, now known to be defendant Salvador Garcia. Both entered the garage, and came out with a "real big" box (later shown to be a box that had contained a chair purchased by Mr. Soto), and put it in the trunk of Mr. Soto's car. Both then entered the car, and Mr. Soto again drove in a circuitous manner back to 1925 South 51st Court in Cicero and parked. Mr. Soto and Mr. Garcia opened the trunk, and they carried the box to the entrance of the building, again looking up and down the street in a furtive manner. At that point, Lieutenant Dailey believed, based on his experience, the furtive glances, the circuitous driving, and his previous experience with the West 38th Street house, in addition to the information received from the informant, that Messrs. Soto and Garcia were moving narcotics. He told one agent, by radio, to cover the back of the house, left his car parked about eight car lengths north of 1925 South 51st Court, and walked toward that address. As he left his car, the two defendants climbed the steps to the porch, then opened the aluminum-framed storm door and entered the building, and apparently maneuvered around the inside door and headed upstairs. Lieutenant Dailey testified that as he reached the bottom step to the porch, he could see one of the defendants and a part of the cardboard box inside the small hallway. He testified that he yelled, "Police officer, hold it a minute," but that the men dropped the

box, and ran up the stairs. He then followed with his gun drawn. Lieutenant Dailey testified that as he ran up the stairs, he saw the box laying across the bottom three or four steps, broken open so that he could see at least two taped packages that based on his experience he believed to contain narcotics. Lieutenant Dailey said that he did not stop to look at the box, but either jumped over or moved around the box and ran up the stairs after the two men. He entered the upstairs apartment, where the door was open, and where in addition to Messrs. Soto and Garcia, he saw Mr. Martinez standing without a shirt on, and Ms. Zafiro sitting on a couch in the living room. He had other officers, who had followed him into the building, look in other rooms of the apartment for other persons. When he determined that the apartment was secure, he went back downstairs, and field-tested the package that had partly fallen outside the box for cocaine. The test was positive. He then went back upstairs and told each of the four individuals that they were under arrest, and one of the other officers gave Miranda warnings to those arrested. Lieutenant Dailey then did a pat-down search of each of the four individuals, and took papers and the keys from each.²

Following the arrests, a group of agents drove to the 3517 West 38th Street residence in Chicago, where Messrs.

² In her motion to suppress, Ms. Zafiro claims that the government also took mail, a handbag, and other personal effects. However, at the hearing, she put on no evidence to challenge the government witnesses' testimony that only papers and keys were taken from the persons of the four defendants after their arrests.

Soto and Garcia had obtained the box of cocaine. Detective Rodriguez testified that he and Lieutenant Dailey went to the front door, where they met a woman who identified herself as Belen Soto, the wife of the defendant Mr. Soto, and who lived there. He testified that Mrs. Soto was not arrested or threatened with arrest, nor were any guns drawn. He said that, conversing in Spanish with Mrs. Soto, he asked her if the agents could search both the house and the garage, also telling her that she did not have to consent to the search. Nonetheless, she agreed to the search. Because the agents did not have a Spanish language consent form with them, Detective Rodriguez and Lieutenant Dailey both testified that Mr. Rodriguez orally translated the form into Spanish for Mrs. Soto, who then signed it. *See* Government Exhibit 3.

Mrs. Soto also testified at the hearing through a translator. She testified that four or five police officers came to her front door, including Detective Rodriguez. She said that Detective Rodriguez told her that her husband had been arrested and that he had to check the house. She testified that he did not ask for her consent to search the house, nor did Detective Rodriguez tell her that she did not have to permit the officers to search the house. Mrs. Soto, who was at the house with her two infants, said that the officers told her to sit in the kitchen and not move. According to Mrs. Soto, some officers went to the basement and others then went to the garage, while she was not permitted to move from the table. At the close of cross-examination, she emphatically stated that Detective Rodriguez did not read the consent form to her.

However, earlier on cross-examination, she acknowledged that she had signed the consent form, that Detective Rodriguez spoke to her in Spanish, that he told her that her husband had been arrested, and that he had asked her if she had narcotics in the house, to which she replied "no." She also replied, "maybe," when the Assistant United States Attorney asked her, for the second time, whether it was possible that she had told Detective Rodriguez that it was all right for the agents to search the house. The first time she was asked this question, she stated she did not remember.

Lieutenant Dailey testified that, having obtained what he believed to be a valid consent to search, he had agents search both the house and garage. During the subsequent search of the house, agents found a triple beam scale. In the garage, the agents saw a Ford Probe, which was opened using a car key that had been taken previously from Mr. Soto. In the car, agents found a blue duffle bag that they opened, and which contained approximately four kilograms of cocaine. The scale, the car, and the cocaine were seized.

Following the search of the house and garage, one of the agents prepared an affidavit for a search warrant for the second floor apartment at 1925 South 51st Court in Cicero. The warrant was issued that afternoon by Magistrate Balog, and agents then searched the Cicero apartment. In the apartment, the agents seized a suitcase in the bedroom closet that contained 7.25 kilograms of cocaine, an ounce of brown heroin, and about four pounds of marijuana. Agents also seized a knapsack that contained \$23,000.00 in cash. In addition, other documents and papers were seized during the search.

Ms. Zafiro and Mr. Martinez have filed motions to quash their arrests, and all defendants have moved to suppress evidence seized during searches incident to their arrests, and during searches of the 3517 West 30th Street apartment and garage, and the search of the 1925 South 51st Court apartment. I recommend that all these motions be denied.

Motion To Quash Arrest

Initially, Mr. Martinez and Ms. Zafiro have moved to quash their arrests, contending that the arrests were made without probable cause and without a warrant. I disagree.³

The existence of probable cause depends upon "factual and practical considerations of everyday life," *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986) (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 76 L.Ed.2d 527, 544 (1983)), including tips received from informants, as well as the unusual reliability of a particular informant. *Id.* at 232-234, 76 L.Ed.2d at 544-546. See *McKinney v. George*, 726 F.2d 1183, 1187 (7th Cir. 1984) (police have probable cause if they believe, with reason, that their informant was telling the truth).

In this case, the government had information from an unusually reliable informant, who had provided correct information on at least three previous occasions, that Mr.

³ Since the defendants were later indicted by a grand jury, whether there was probable cause to arrest the defendants on February 22 is relevant only to whether the evidence seized incident to that arrest should be suppressed.

Martinez and Ms. Zafiro were expecting a multi-kilogram shipment of cocaine to be delivered to their residence at 1925 South 51st Court in Cicero. Further, the agents had confirmed through checks with various utility companies that a J. Martinez and a Gloria Zafiro were customers for the second floor apartment at 1925 South 51st Court. Finally, agents observing the 1925 South 51st Court apartment had noted persons entering and leaving the apartment acting in a suspicious manner. Agents observed Mr. Soto look up and down the street before entering the building, and then followed him, via a circuitous route, to a residence that had previously been involved in narcotics investigations. Moreover, when Messrs. Soto and Garcia returned to the 1925 South 51st Court apartment carrying a large box, and were stopped at the door to the building by an officer who identified himself as such, the defendants immediately dropped the box and ran up the stairs. Probable cause does not mean that an officer must have a virtual certainty that a crime is being committed. Rather, probable cause means that an agent have a reasonable basis for believing that a search or seizure will turn up the perpetrator of a crime. *Llaguno v. Mingey*, 763 F.2d 1560, 1565, (7th Cir. 1985), *cert. dismissed*, 107 S.Ct. 16 (1986). Here, given the totality of the circumstances, the agents observing the 1925 South 51st Court apartment had probable cause to believe that Mr. Garcia, Mr. Soto, and the residents of the apartment, that is, Mr. Martinez and Ms. Zafiro, were engaged in a drug trafficking conspiracy.

Mr. Martinez and Ms. Zafiro also claim that their arrests should be quashed because the drug task force agents arrested them without warrants. Generally, more

than probable cause is required for an in-home arrest. Police must secure a warrant unless they can show some exception to the warrant requirement. *United States v. Altman*, 797 F.2d 514, 515 (7th Cir. 1986). The Supreme Court has recognized only a few emergency conditions that justify warrantless home arrests. These include, however, hot pursuit of a fleeing felon, and destruction of evidence. *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 80 L.Ed.2d 732, 743 (1984) (citing cases). In this case, the agents followed the fleeing Mr. Soto and Mr. Garcia, whom they had probable cause to believe were committing a felony, *i.e.*, distributing cocaine, into the upstairs apartment of Mr. Martinez and Ms. Zafiro, whom the agents had probable cause to believe were also involved in a conspiracy to distribute the controlled substance. When Messrs. Garcia and Soto fled into the apartment after having been asked to stop by Lieutenant Dailey, it is reasonable to assume that had the agents not followed the fleeing men upstairs and arrested the occupants of the apartment, the defendants would have either fled the apartment or attempted to destroy evidence, such as drugs and records or other documents. Accordingly, exigent circumstances for the warrantless in-home arrests of Mr. Martinez and Ms. Zafiro were present in this case, and I recommend that Mr. Martinez' and Ms. Zafiro's motions to quash their arrests be denied.

Next, the defendants claim that papers and documents seized from their person following their arrests should be suppressed. Again, I disagree. Government agents may conduct a limited search incident to arrest in the immediate area surrounding the arrestee. *United States v. Queen*, 847 F.2d 346, 352 (7th Cir. 1988). Here, the

documents and papers seized from the four defendants following their arrests were taken from their person. Thus, the search was limited to the area within the arrestee's immediate control. Since there was probable cause to arrest the four defendants, the seizure of papers and documents from their person following the arrest was a proper search incident to arrest. *Id.* Accordingly, I recommend that defendants' motions to suppress that evidence be denied.

Next, Messrs. Soto and Garcia claim that the search of the Sotos 3517 West 38th Street home was made without the consent of the owners, and that the evidence seized there should be suppressed. A search conducted pursuant to consent is one of the specifically established exceptions to the requirements of both a warrant and probable cause. *United States v. Marin*, 761 F.2d 426, 433 (7th Cir. 1985) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L.Ed.2d 854 (1973)). The prosecution has the burden of establishing that consent to a search was freely and voluntarily given, and whether a consent was voluntary is a question of fact to be determined from the totality of all the circumstances. *United States v. Marin, supra*, 761 F.2d at 433. The prosecution may show that permission to search was obtained from a third party who possessed common authority over the premises sought to be searched, such as a wife who lives in a residence with her husband. *Id.*

Here, there is no question that Mrs. Soto lived at 3517 West 38th Street with Mr. Soto. Thus, she had the authority to consent to a search of the house and garage located at that address. Further, the government has presented evidence that the consent form was orally translated into

Spanish for Mrs. Soto by Agent Rodriguez. The government has also presented testimony that the agents speaking with Mrs. Soto did not draw their guns, threaten her with arrest, or otherwise coerce her into signing the consent form. While Mrs. Soto may have been upset by the presence of the agents, the knowledge of her husband's arrest, and the request to search the house and garage, absent coercion, the voluntariness of her consent is not overcome by the fact that she may have been upset. *United States v. Marin, supra*, 761 F.2d at 434. While Mrs. Soto testified on direct examination that she had not previously seen the consent form, on cross-examination she acknowledged that the signature on the form was hers. Further, she acknowledged that "maybe" she had told Detective Rodriguez that it was all right for the agents to search the house. I conclude that in light of the totality of the circumstances, the government proved that Mrs. Soto's consent to search the house and garage located at 3517 West 38th Street was voluntarily given.⁴

Next, Ms. Zafiro and Mr. Martinez challenged the search of their apartment at 1925 South 51st Court, made pursuant to the search warrant issued by Magistrate Balog on February 22, 1989. They argue that the search warrant should be quashed.

"A magistrate's issuance of a search warrant based on probable cause will be upheld 'so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a

⁴ Mr. Garcia has presented no evidence that he lived at 3517 West 38th Street. Since he had no common authority over those premises, he had no standing to object to the search conducted there.

search would uncover evidence of wrongdoing. . . . " *United States v. Griffin*, 827 F.2d 1108, 1111 (7th Cir. 1987) (quoting *Illinois v. Gates*, 462 U.S. 213, 236, 76 L.Ed.2d 527 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271, 4 L.Ed.2d 697 (1960))). The Seventh Circuit has noted that:

"[A] magistrate's determination of probable cause is to be 'given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense matter, does not allege specific facts and circumstances from which the magistrate could reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated.' "

United States v. Griffin, supra, 827 F.2d at 1111 (quoting *United States v. Prichard*, 745 F.2d 1112, 1120 (7th Cir. 1984) (quoting *United States v. Rambis*, 686 F.2d 620, 622 (7th Cir. 1982))). Whether the supporting affidavit is sufficiently reliable to support a determination of probable cause depends on the totality of the circumstances, and involves a consideration of the various indicia of reliability including the affiant's veracity and the basis of his knowledge set forth in the affidavit. *United States v. Griffin, supra*, 827 F.2d at 1111.

In this case, the affidavit was made by Thomas Bridges, a Chicago police detective assigned to the drug task force. In the affidavit he stated that the information he supplied was based both on direct knowledge and on information provided by other agents. This declaration in the affidavit provides sufficient indicia of reliability. See *United States v. Griffin, supra*, 827 F.2d at 1111 (observations of fellow officers of the government engaged in a

common investigation are plainly a reliable basis for a warrant applied for by one of their number). Further, the affidavit details the course of the investigation to the time the affidavit was made, including specific times, dates, and locations where the investigation and surveillance took place. The affidavit included the information that the package the box dropped at 1925 South 51st Court field-tested positive for cocaine. The defendants argue that because the box was dropped outside the second floor apartment, and the informant only indicated that a shipment of narcotics was to be made to the Martinez-Zafiro apartment, the affidavit does not present probable cause to believe that there would be other narcotics or evidence inside the apartment. I disagree. In this case, Magistrate Balog was required:

"to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information,"

Illinois v. Gates, supra, 462 U.S. at 238, that there was a fair probability that evidence of a conspiracy to distribute narcotics would be found in the second floor apartment of 1925 South 51st Court in Cicero, Illinois. I conclude that under the totality of the circumstances of this case, Agent Bridges' affidavit provided the required basis for concluding that probable cause to search the second floor apartment at 1925 South 51st Court in Cicero existed.⁵

⁵ Defendants also claim that the search warrant was not valid because the text of the warrant lists the premises as 1925

(Continued on following page)

Defendants' last argument is that the cocaine located in the box dropped by Messrs. Soto and Garcia should be suppressed. Defendants contend that the agents seized the box containing the cocaine from the apartment before the agents arrested the four defendants. However, the government has presented credible evidence that the box was dropped outside the apartment by Messrs. Garcia and Soto.⁶

Once the box was dropped in the hallway by Messrs. Soto and Garcia, its search by government agents was lawful because the box was voluntarily relinquished by Messrs. Soto and Garcia. *Abel v. United States*, 362 U.S. 217, 241 (1960). The test for whether Messrs. Soto and Garcia abandoned the box is whether they retained any reasonable expectation of privacy in the object, based on objective standards. *United States v. Jones*, 707 F.2d 1169,

(Continued from previous page)

South 51st Court, Second Floor Apartment, Chicago, Illinois, rather than Cicero, Illinois, as the caption of the search warrant reads, and as is indicated in the affidavit attached to the warrant. Given the fact that the affidavit and the caption both contain the correct address, I conclude that the fact that the address in the text of the affidavit is given as Chicago, Illinois, was merely a typographical error that does not affect the validity of the warrant. *See United States v. Bentley*, 825 F.2d 1104, 1109 (7th Cir. 1987) (upholding a search of an office not listed in the warrant because the warrant listed the wrong room number, and noting that officers did what they should have done in searching the right office rather than the one with the number mistakenly given in the warrant).

⁶ I found Mr. Soto's testimony that the box was inside the apartment, on the kitchen table, when first seen by agents not to be credible.

1172 (10th Cir. 1983). Here, Mr. Soto and Mr. Garcia discarded the box in the hallway, and fled. Their objective acts manifested a clear intent to relinquish any expectation of privacy in the box. *Id.* at 1172-73. "There can be nothing unlawful in the government's appropriation of such abandoned property." *Abel v. U.S.*, *supra*, 362 U.S. at 241.

Conclusion

I recommend that the defendants' motion to quash the arrests of Mr. Martinez and Ms. Zafiro be denied. I recommend that the defendants' motion to suppress the evidence seized during the search of the defendants incident to their arrests be denied. I recommend that the defendants' motions to suppress the evidence seized during the search of the premises at 3517 West 38th Street, Chicago, Illinois, be denied. I recommend that the defendants' motion to quash the search warrant issued by Magistrate Balog on February 22, 1989, authorizing a search of the second floor apartment at 1925 South 51st Court, Cicero, Illinois, be denied. I recommend that the defendants' motion to suppress the box of cocaine dropped in the stairwell of the 1925 South 51st Court apartment building be denied.

/s/ Elaine E. Bucklo
ELAINE E. BUCKLO
 United States Magistrate

Dated: August 4, 1989.

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter

must be filed with the Honorable Nicholas J. Bua within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

Copies have been mailed to:

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 P.O. Box D
 El Paso, TX 79951

Attorney for Plaintiff

Attorneys for Defendants

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	JUDGE BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.
Case Number	89 CR 165-1, 2, 3, & 4	Date
Case Title	U.S.A. -vs- GLORIA ZAFIRO, et al.	
	August 7, 1989	

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) <input type="checkbox"/> Judgment is entered as follows:	(2) <input checked="" type="checkbox"/> X (Other docket entry:)
Defendant Jose Martinez's motion to sever or for a separate jury trial is denied. Defendant Martinez's oral motion to bar jury during testimony of defendant Zafiro is denied as moot. Defendant Martinez's motion in limine and defendant Zafiro's oral motion in limine are entered and continued for the reasons stated in open court.	
(3) <input type="checkbox"/> Filed motion of (use listing in "MOTION" box above).	
(4) <input type="checkbox"/> Brief in support of motion due	
(5) <input type="checkbox"/> Answer brief to motion due	Reply to answer brief due
(6) <input type="checkbox"/> Hearing Ruling on	set for at
(7) <input type="checkbox"/> Status hearing <input type="checkbox"/> held <input type="checkbox"/> continued to	set for at
(8) <input type="checkbox"/> Pretrial conference <input type="checkbox"/> held <input type="checkbox"/> continued to	set for at
(9) <input type="checkbox"/> Trial <input type="checkbox"/> set for <input type="checkbox"/> reset for	at
(10) <input type="checkbox"/> Bench trial <input type="checkbox"/> jury trial <input type="checkbox"/> Hearing held and continued to	at
(11) <input type="checkbox"/> This case is dismissed <input type="checkbox"/> without <input type="checkbox"/> with prejudice and without costs	by agreement <input type="checkbox"/> pursuant to
<input type="checkbox"/> FRCP 4(j) (failure to serve)	<input type="checkbox"/> General Rule 21 (waiver of prosecution)
<input type="checkbox"/> (For further detail see order on the reverse of order attached to the original minute order form.)	<input type="checkbox"/> FRCP 41(a)(1) <input type="checkbox"/> FRCP 41(a)(2)
(12) <input type="checkbox"/>	

No notices required.	RECEIVED	FD-1	number of notices	Document #
Notices mailed by judge's staff.	89 AUG -7 PM 3:33	AUG 16 1989	date docketed	83
Notified counsel by telephone.			docketing dpty. initials	
Docketing to mail notices.			date mld. notices	
Mail AO 450 form.			mailing dpty. initials	
Copy to judge/magistrate.				
courtroom deputy's initials	aew	Date/time received in central Clerk's Office		

United States District Court
NORTHERN District of ILLINOIS
 EASTERN DIVISION

UNITED STATES OF AMERICA **JUDGMENT INCLUDING
SENTENCE UNDER THE
SENTENCING REFORM ACT**

V.

GLORIA ZAFIRO Case Number 89 CR 165-1

(Name of Defendant) THOMAS J. ROYCE
 Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) One (1) and acquitted as to counts 2, 3 & 4 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Count Number(s)</u>
21 USC 846	Conspiracy to possess with intent to distribute cocaine, heroin, and marijuana	1

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☒ The defendant has been found not guilty on count(s) Two(2), Three (3), and Four (4), and is discharged as to such count(s).
- ☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
- ☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
- ☒ It is ordered that the defendant shall pay to the United States a special assessment of \$ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:

354-50-4133

November 16, 1989

Date of Imposition of Sentence

Defendant's
mailing address:

/s/ Nicholas J. Bua
Signature of Judicial
Officer

Chgo. Metropolitan
Correctional Center
71 West Van Buren
Chicago, IL 60605

NICHOLAS J. BUA,
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's
residence address:

November 16, 1989
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS.

This term consists of terms of ONE-HUNDRED-FIFTY-ONE (151) MONTHS on Counts One, with credit for time served from February 22, 1989.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m.
p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

 Defendant delivered on _____ to _____ at
 _____, with a certified copy of this Judgment.

 United States Marshal

By _____
 Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- [] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

DEFENDANT'S MOTION TO ADOPT MOTIONS
OF CO-DEFENDANTS

NOW COMES defendant JOSE MARTINEZ, by and through his attorney, STEVEN R. DECKER, and moves this Court to permit the defendant JOSE MARTINEZ, to adopt all motions and supporting Memoranda of Law filed by co-defendants, Gloria Zafiro, Alfonso Sota and Salvador Garcia, in this action and in support thereof states as follows:

1. By this motion, defendant JOSE MARTINEZ, seeks to adopt all motions in supporting Memoranda of Law filed in this action by any of the co-defendants in order to avoid duplication of effort by the Court, United States Attorney's office and other defense counsel.

2. The interest of justice will best be served by the granting of this motion and defendant does not see any way in which the Government can be prejudice [sic] thereby.

WHEREFORE, for the forgoing reasons, defendant respectfully requests this that Honorable Court enter an order granting the relief requested in this motion.

Respectfully submitted,

/s/ Steven R. Decker

STEVEN R. DECKER, attorney
for defendant, Jose Martinez.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	No. 89-CR-165-2
-vs-)	Judge Nicholas
JOSE MARTINEZ,)	Bua
Defendant.)	

MOTION TO SEVER OR IN THE ALTERNATIVE
REQUEST FOR SEPARATE JURY TRIAL

NOW COMES defendant, JOSE MARTINEZ, by and through his attorney, STEVEN R. DECKER, and pursuant to Fed. R. Crim. P. 14, does hereby request that this Court grant a severance to defendant MARTINEZ from a trial with co-defendant Gloria Zafiro. In support thereof defendant MARTINEZ states as follows:

1. Defendant JOSE MARTINEZ, having recently concluded the hearing on his motion to suppress became aware, for the first time, that his co-defendant, Gloria Zafiro, at the time of trial will testify in her own behalf, and make statements which will implicate defendant Martinez.

2. Defendant does not desire to testify at his trial, and after his unsuccessful proffer of his testimony to the Government, will be effectively estopped from testifying in his own behalf.

3. Although defendant Martinez acknowledges that some "finger-pointing is an acceptable cost of the joint trial", *United States vs. Buljedsic*, 808 F.2d 1260, 1263 (7th

Cir.), *cert. denied*, 108 S. Ct. 67 (1987), in this case only Zafiro will be doing the "finger-pointing", and her finger is pointed at defendant Marintez [sic].

4. Alternatively, the defendant Martinez submits that should the Court reject his motion to sever the defendant, he respectfully requests that the Court impanel a separate (illegible) to decide only defendant Martinez's guilt or innocence, and his jury could be excluded from the trial during the anticipated "finger-pointing" of co-defendant Zafiro.

WHEREFORE, defendant Martinez, respectfully requests that this Honorable Court grant his motion to sever or in the alternative to select a separate jury.

Respectfully submitted,

/s/ Steven R. Decker
STEVEN R. DECKER, attorney
for defendant, Jose Martinez.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge/Magistrate	BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.
Case Number	89 CR 165-2	Date
Case Title	U.S. v. JOSE MARTINEZ	
		16 Aug 89

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Sent for Microfilming	
AUG 18 1989	
Filed on AUG 21 1989	

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) <input type="checkbox"/> Judgment is entered as follows:	(2) <input checked="" type="checkbox"/> [Other docket entry:]
Jury deliberation begins. Jury returns verdict of guilty on all counts.	
Court enters judgment of guilty on counts 1,2,3, and 4. Trial ends.	
Cause referred to probation department for presentence investigation.	
Sentencing set for November 21, 1989 at 9:45 AM. Defendant to file post trial motions by 15 Sep 89, and government to answer by 29 Sep 89.	

(3) <input type="checkbox"/> Filed motion of [use listing in "MOTION" box above].	
(4) <input type="checkbox"/> Brief in support of motion due	Reply to answer brief due
(5) <input type="checkbox"/> Answer brief to motion due	
(6) <input type="checkbox"/> Hearing on	at
(7) <input type="checkbox"/> Status hearing	held <input type="checkbox"/> continued to <input type="checkbox"/> set for <input type="checkbox"/> at
(8) <input type="checkbox"/> Pretrial conference	held <input type="checkbox"/> continued to <input type="checkbox"/> set for <input type="checkbox"/> at
(9) <input type="checkbox"/> Trial	set for <input type="checkbox"/> at
(10) <input type="checkbox"/> Bench trial	Jury trial <input type="checkbox"/> Hearing held and continued to <input type="checkbox"/> at
(11) <input type="checkbox"/> This case is dismissed	without <input type="checkbox"/> with <input type="checkbox"/> prejudice and without costs <input type="checkbox"/> by agreement <input type="checkbox"/> pursuant to
(12) <input type="checkbox"/> FRCP 4(j) (failure to serve)	General Rule 21 (waiver of prosecution) <input type="checkbox"/> FRCP 41(a) (1) <input type="checkbox"/> FRCP 41(a)(2)
(For further detail see <input type="checkbox"/> order on the reverse of <input type="checkbox"/> order attached to the original minute order form.)	

No notices required.		number of notices	
Notices mailed by judge's staff.		date docketed	
Notified counsel by telephone.		docketing dpy. initials	
Docketing to mail notices.		date mld. notices	
Mail AO 450 form.		mailing dpy. initials	
Copy to judge/magistrate.			
courtroom deputy's initials	Date/time received in central Clerk's Office	Document #	
fla	89 AUG 17 AM 4	99	
	AUG 18 1989		
	AUG 18 1989		

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	BUA		Sitting Judge/Mag. If Other Than Assigned Judge/Mag.
Case Number	89 CR 165-2	Date	September 18, 1989
Case Title	U.S. v. JOSE MARTINEZ		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [X] (Other docket entry:)

Defendant's motion for a new trial is denied.

(3)	Filed motion of [use listing in "MOTION" box above]
(4)	Brief in support of motion due _____
(5)	Answer brief to motion due _____
(6)	Hearing Ruling on _____ set for _____ at _____
(7)	Status hearing <input type="checkbox"/> held <input type="checkbox"/> continued to <input type="checkbox"/> set for <input type="checkbox"/> at _____
(8)	Pretrial conference <input type="checkbox"/> held <input type="checkbox"/> continued to <input type="checkbox"/> set for <input type="checkbox"/> at _____
(9)	Trial <input type="checkbox"/> set for <input type="checkbox"/> at _____
(10)	<input type="checkbox"/> Bench trial <input type="checkbox"/> Jury trial <input type="checkbox"/> Hearing held and continued to _____ at _____
(11)	This case is dismissed <input type="checkbox"/> without <input type="checkbox"/> with prejudice and without costs <input type="checkbox"/> by agreement <input type="checkbox"/> pursuant to _____
(12)	<input type="checkbox"/> FRCP 4(D) (failure to serve) <input type="checkbox"/> General Rule 21 (want of prosecution) <input type="checkbox"/> FRCP 41(a)(1) <input type="checkbox"/> FRCP 41(a)(2)

No notices required. Notices mailed by judge's staff. Notified counsel by telephone. Docketing to mail notices. Mail AO 450 form. Copy to judge/magistrate.	RECEIVED 89 SEP 18 PM 12:23 SEP 19 1989	4 SEP 19 1989 sh	number of notices	Document #
			date docketed	111
			docketing dpty. initials	
			date mid. notices	
courtroom deputy's initials fls	Date/time received in central Clerk's Office sh	mailing dpty. initials sh		

United States District Court

NORTHERN District of ILLINOIS

EASTERN DIVISION

UNITED STATES OF
AMERICA

V.

JOSE MARTINEZ

JUDGMENT INCLUDING
SENTENCE UNDER THE
SENTENCING REFORM ACT

Case Number 89 CR 165-2

(Name of Defendant)

Steven Decker
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☒ was found guilty on count(s) one, two, three, and four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Count Number(s)</u>
21 USC 846	Conspiracy	1
21 USC 841(a)(1)	Possession with intent to distribute controlled substances	2,3,4

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
- ☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
- ☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
- ☒ It is ordered that the defendant shall pay to the United States a special assessment of \$ 200.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:

526-33-6127

Defendant's
mailing address:

Metropolitan
Correctional Center
Chicago, Illinois

Defendant's
residence address:

3102 East Avenue
Berwyn, Illinois

November 21, 1989

Date of Imposition of Sentence

/s/ Nicholas J. Bua

Signature of Judicial
Officer

NICHOLAS J. BUA, JUDGE

Name & Title of Judicial Officer

November 21, 1989

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED SIXTY-TWO (262) MONTHS.

It is further ordered that defendant be given credit for time already served.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m.
p.m. on _____

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at
 _____, with a certified copy of this Judgment.

 United States Marshal

By _____
 Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- [] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	) No. 89 CR 165
Plaintiff,)
	) JUDGE BUA
v.)
GLORIA ZAFIRO, JOSE	) (Filed Apr. 25,
MARTINEZ, ALFONSO SOTO	) 1989)
and SALVADOR GARCIA,)
Defendants.)

MOTION TO SEVER DEFENDANT SOTO FROM
DEFENDANT GARCIA

Now comes the defendant, ALFONSO SOTO, by his attorney, LELAND SHALGOS, pursuant to Rules 8B and 14 of the Fed. R. Crim. P. and moves to sever the aforementioned defendants' cases from each other. In support of said motion, defendant states as follows:

1. Alfonso Soto and Salvador Garcia were arrested with Gloria Zafiro and Jose Martinez and charged with sundry violations of Title 21 U.S.C. 841(a) (1) and 846 on February 22, 1989.

2. Subsequent to the aforementioned defendants' arrest, all four defendants were indicted by the Special May 1987 Grand Jury and charged together in the aforementioned indictment as follows:

a) Alfonso Soto - Count 1: Conspiracy to distribute cocaine; Count 5: possession with intent to distribute 25 kilograms of cocaine; Count 6: possession with intent to distribute 3.5 kilograms of cocaine.

b) Salvador Garcia - Count 1: Conspiracy to distribute cocaine; Count 5: possession with intent to distribute 25 kilograms of cocaine.

3. The prosecution alleges on information and belief (see attached search warrant/affidavit attached hereto as Exhibit 1) that Soto visited the home of Zafiro and Martinez on February 22, 1989, left that residence within a short period of time and went to 3517 W. 38th Street, Chicago, Illinois where he met with Garcia. Subsequently, Soto then returned to the Zafiro/Martinez residence where he was arrested along with Garcia while carrying a box containing 25 kilograms of cocaine.

4. Alfonso Soto's defense that he will testify to in the aforementioned indictment is that he had no knowledge of the contents of the box that he was carrying and that he was simply assisting Garcia at Garcia's request relative to delivering the box to the occupants of the home located at 1925 S. 51st Court, Cicero, Illinois (the Zafiro/Martinez residence). Additionally, Soto will testify to the aforementioned by specifically inculping both Garcia and the unknown occupants of the apartment wherein Zafiro and Martinez resided.

5. The attorney for Soto has communicated with the attorney for Garcia, Joseph Sib Abraham, and has been advised that Soto's defense is precisely the opposite of and inconsistent with Garcia's, *vis.* that Garcia will testify that Soto performed the aforementioned acts as is alleged by the government in their affidavit for search and that he, Garcia, had no knowledge of the contents of the box with the cocaine.

6. The defense of Garcia and Soto conflict to the point of being irreconcilable and mutually exclusive and inconsistent because each defendant accuses the other of having performed acts which demonstrate culpability. See *United States v. Shively*, 715 F.2d 260 (7th Cir. 1983); *United States v. Oglesby*, 764 F.2d 1273 (7th Cir. 1985). As a consequence, the defenses that each defendant is going to interpose are antagonistic to one another and as a consequence will effectively deny each other a fair trial.

WHEREFORE, the defendant, ALFONSO SOTO, requests this Honorable Court to sever the matter from that of Salvador Garcia.

Respectfully submitted,

ALFONSO SOTO

BY: /s/ Leland Shalgos
HIS ATTORNEY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 89 CR 165 -3
Plaintiff,)	
	)	JUDGE
v.	)	NICHOLAS
ALPHONSO SOTO	)	BUA
Defendant.)	
	)	(Filed Sept. 15,
	)	1989)
)	
)	

MOTION FOR A NEW TRIAL

Now comes Alphonso Soto through his attorney, Leland Shalgos, requests this Honorable court pursuant to Rule 33, F.R. Crim. P. to grant defendant a new trial. In support thereof, defendant states:

1. The court erred when it denied the defendant's discovery request for notice of evidence of other crimes (Rule 404 (B) F. R. Crim. P.) Further, when the evidence was unexpectedly received, error occurred when the court denied defendant's objection to the admission of this Rule 404 (B) evidence on the grounds that it violated Rule 403 Fed. R. Crim. P.

2. The court erred when it failed to grant the defendant a severance from co-defendant, Salvador Garcia, because of the fact that Garcia's defense was antagonistic to Soto's and vice versa.

Respectfully submitted,

ALPHONSO SOTO

BY: /s/ Leland Shalgos
HIS ATTORNEY

LELAND SHALGOS
29 S. LaSalle Street
Suite 440
Chicago, Illinois 60603
(312) 782-8520

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	
	)	No. 89 CR 165
v.)	
GLORIA ZAFIRO,	)	Honorable
JOSE MARTINEZ, ALFONSO	)	Nicholas J.
SOTO, and SALVADOR GARCIA,	)	Bua,
Defendants.	)	Presiding

ORDER

Following their indictment on drug conspiracy charges, defendants Gloria Zafiro, Jose Martinez, Alfonso Soto, and Salvador Garcia have filed a variety of pretrial motions. This court cannot decide some of defendants' motions without first resolving certain factual disputes. For this reason, the court has instructed Magistrate Bucklo to conduct an evidentiary hearing concerning defendants' motions to quash certain arrests, quash a search warrant, and suppress certain evidence seized by government agents. Having referred these motions to the magistrate, the court will now rule on the remainder of defendants' motions.

I. Motions to Adopt

Martinez, Soto, and Garcia have moved to adopt the pretrial motions of their codefendants. To the extent that

any defendant's motion applies to any or all codefendants, the court grants the three defendants' motions to adopt.

II. Discovery Motions

Pursuant to Fed. R. Crim. P. 16, Martinez moves for disclosure of all statements that the government seeks to attribute to him. The government responds that it has satisfied and will continue to satisfy its obligations under Rule 16. Based on the government's representations, this court denies Martinez's discovery motion.

In addition to Martinez's request for disclosure, Soto and Garcia have filed a 23-page discovery motion. They seek to discover a wide assortment of documents and information. Without addressing every aspect of the lengthy motion filed by Soto and Garcia, the government asserts that it has fully complied with the discovery requirements imposed by Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The government also points out that several of the requests made by Soto and Garcia fall outside the scope of Rule 16. Specifically, the government objects to defendants' requests for the identity of confidential informants, a list of government witnesses, and evidence in the government's possession that tends to impeach defense witnesses.

The government acknowledges that it relied on a tip from a confidential informant when it initiated its investigation of defendants. Nonetheless, the government insists that it should not have to disclose the identity of its

confidential informant. This court agrees with the government's position. The government has indicated that it does not intend to call the informant as a witness at trial. Moreover, the informant did not witness any of the crimes with which defendants are charged; he merely provided the tip that launched the investigation. Thus, disclosure of the informant's identity will not appreciably assist defendants in preparing for trial. Under those circumstances, the government's interest in maintaining the confidentiality of its informant's identity outweighs defendants' need for disclosure. See *United States v. Bakhoory*, 819 F.2d 1415, 1424-25 (7th Cir. 1987), cert. denied, 108 S. Ct. 749 (1988).

The government has also balked at defendants' request for a list of prospective government witnesses. As the government notes, the Federal Rules of Criminal Procedure do not entitle a defendant to a list of prospective witnesses. *United States v. Bouye*, 688 F.2d 471, 473-74 (7th Cir. 1982). Consequently, this court will not require the government to produce such a witness list. Of course, once Soto supplies the government with a list of witnesses who will testify in support of Soto's alibi defense, the government will have to provide Soto with a list of witnesses who will tend to rebut Soto's alibi. See Fed. R. Crim. P. 12.1(a), (b).

The government's final objection concerns defendants' request for evidence tending to impeach defense witnesses. The Federal Rules of Criminal Procedure do not require the government to disclose impeachment evidence. In fact, according to the Seventh Circuit, "there is a serious question whether a district judge is empowered

to require discovery of impeachment evidence" by federal criminal defendants. *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985). Because this court lacks clear authority to mandate discovery of impeachment evidence, the court will not order the government to disclose such evidence in the instant case.

For the most part, the government appears to have complied with defendants' reasonable discovery requests. Nonetheless, the government has not indicated whether it has instructed its agents to preserve the notes they made while investigating defendants. Given the government's silence on this issue, the court will enter an order directing the government to take steps to preserve its agents' notes. In all other respects, however, the court denies the discovery motion filed by Soto and Garcia.

III. Motions to Sever

Shortly before making arrests in this case, government agents accosted Soto and Garcia while the two defendants were carrying a box into the building where Zafiro and Martinez reside. When the government agents identified themselves, Soto and Garcia dropped the box and fled to the apartment occupied by Zafiro and Martinez. The government later determined that the box contained cocaine. At trial, Soto and Garcia intend to point accusatory fingers at each other. Each defendant claims that he did not own the box or know of its contents. Each defendant also asserts that he was simply helping to carry the box at the request of the other defendant. Soto and Garcia characterize their trial strategies as "mutually antagonistic defenses." Based on this characterization,

both defendants have moved to sever their cases from each other pursuant to Fed. R. Crim. P. 14.

A court should resort to severance only when the defenses of multiple defendants would produce inevitable prejudice in the context of a joint trial: "Unless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants, it is not necessary to hold separate trials." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.) (emphasis in original), *cert. denied*, 108 S. Ct. 67 (1987). The circumstances that might warrant severance do not exist in the instant case. In evaluating the government's case against Soto and Garcia, a jury could accept the defense offered by one defendant while concluding that the government did not sufficiently establish the guilt of the other defendant. For this reason, the court does not regard the defenses asserted by Soto and Garcia as mutually antagonistic. The court acknowledges that a joint trial will probably produce a strategic conflict between Soto and Garcia. Nonetheless, "[f]inger-pointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact." *Id.* For all their "finger-pointing," Soto and Garcia do not plan to assert mutually antagonistic defenses. Therefore, the court denies the two defendants' motions to sever.

CONCLUSION

For the foregoing reasons, the court grants the motions to adopt filed by Martinez, Soto, and Garcia. The court also orders the government to instruct its agents to preserve the notes they made while investigating defendants. In all other respects, however, the court denies defendants' discovery motions. Finally, the court denies the motions to sever filed by Soto and Garcia.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
 Nicholas J. Bua
 Judge, United States District
 Court

Dated: July 11, 1989

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF)	
AMERICA)	No. 89-CR-165-2
)	Judge
-vs-)	Nicholas Bua
JOSE MARTINEZ,)	(Filed
Defendant.)	Sep. 14, 1989)

MOTION FOR A NEW TRIAL

NOW COMES the defendant, JOSE MARTINEZ, by and through his attorney, STEVEN R. DECKER, and pursuant to Federal Rules of Criminal Procedure, Rule 33, moves this Honorable Court to grant the defendant a new trial. In support hereof the following is stated:

1. Following a jury trial the defendant, JOSE MARTINEZ, was found guilty of counts 1, 2, 3, and 4 of the indictment which charged the defendant with conspiracy in violation of Title 21, U.S. Code, Sec. 846; and the offense of possession with intent to distribute, in violation of Title 21, U.S. Code, Sec. 841 (a)(1).

2. The defendant respectfully submits that he was denied a fair trial in that he was not proved guilty of any offense beyond a reasonable doubt, and that furthermore the defendant was denied due process and equal protection under the laws.

3. The defendant furthermore states that he was denied a fair trial, in that prior to trial, his motion to quash arrest and to suppress evidence, as well as his

motion to quash the search warrant, was denied, following a hearing by Magistrate Bucklo.

4. The defendant furthermore submits that this Honorable Court denied the defendant a fair trial by this Court refusal to grant the defendant's motion to sever in that defendant MARTINEZ indicated that he anticipated that the testimony of the co-defendant, Gloria Zafiro, would implicate the defendant. At the trial in this matter, defendant MARTINEZ, did not testify, however, co-defendant Zafiro testified to information which was damaging to the defendant, which would not have been able to be proved by the Government, but for the testimony of co-defendant Zafiro, including evidence that MARTINEZ brought a suitcase into the apartment the night before the arrest.

5. The defendant furthermore submits that he was denied a fair trial by the Government's statement, in their opening statement to the jury: that our surveillance [sic] was set up on the apartment at 1925 S. 51st Court, after certain DEA agents spoke to a confidential informant whose identity will be protected. This error was further compounded when the Government's first witness, Lt. Maurice Daly, stated that police agents use confidential [sic] informants, who are citizens who supply information, but for reasons of confidentiality, [sic] to protect their life, their names are not revealed. In the case at bar there was no evidenced [sic] introduce [sic] to show that the defendant at any time ever threaten [sic] physical violence against any individual, nor did the defendant show the potential for violence. Additionally, during the testimony of Lt. Daly, the defendant was further denied a fair trial by the statement that they were expecting a three

hundred pound delivery of cocaine. The defendant was furthermore denied a fair trial by the testimony of the next witness, Maria Vera, who was allowed to testify, on cross-examination by Zafiro's attorney, regarding her sexual relationship with defendant Jose Martinez.

6. Moreover, defendant MARTINEZ objects to certain testimony by agent Rodriguez, which denied him a fair trial, including the agent's opinion and interpretation of a certain card which was on defendant's person at the time of his arrest. The card, was used to show evidence of other crimes for which the defendant was not charged. Additionally, the defendant objects to testimony of agent Rodriguez, wherein he stated "that there is never an innocent party" around these narcotic transactions, although the defendant MARTINEZ acknowledges that the court did sustain our objection to that statement. The defendant furthermore submits that error occurred during the closing arguments when attorney Royce, on behalf of defendant Zafiro, stated that "both Maria Vera and Gloria were used and abused by Jose Martinez." Moreover, during the Government's rebuttal, the defendant was denied a fair trial by the statement that "the agents can't tell you about prior conspiratorial conversations, because they weren't inside the apartment, but they did occur." This statement, was not supported by the evidence, and as such it denied defendant MARTINEZ a fair trial.

7. Additionally defendant submits that this Honorable Court erred in denying the defendant's motion, pursuant to Federal Rules of Criminal Procedure, Rule 29, for a judgment of acquittal prior to the time the case was submitted to the jury.

8. Defendant JOSE MARTINEZ, furthermore requests that a new trial be granted based upon each and every objection made by defendant JOSE MARTINEZ which was overruled, based upon each and every objection made by the Government which was sustained by the Court, and for each and every other motion for mistrial which was made by the defendant which was denied by the Court.

WHEREFORE, defendant JOSE MARTINEZ, respectfully requests that this Honorable Court grant him a new trial.

Respectfully submitted,

/s/ Steve R. Decker
STEVEN R. DECKER,
attorney on behalf of
defendant, Jose Martinez.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.
Case Number	89 CR 165-3	Date September 18, 1989
Case Title	U.S. v. ALPHONSO SOTO	

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

95

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [XX] (Other docket entry:)

Defendant's motion for a new trial is denied.

(3) ☐ Filed motion of (use listing in "MOTION" box above).

(4) ☐ Brief in support of motion due _____

(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____

(6) ☐ Hearing on _____ set for _____ at _____

(7) ☐ Status hearing ☐ held ☐ continued to _____ set for _____ at _____

(8) ☐ Pretrial conference ☐ held ☐ continued to _____ set for _____ at _____

(9) ☐ Trial ☐ set for _____ at _____

(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____

(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to _____

(12) ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(For further detail see ☐ order on the reverse of ☐ order attached to the original minute order form.)

No notices required. Notices mailed by judge's staff. Notified counsel by telephone. Docketing to mail notices. Mail AO 450 form. Copy to judge/magistrate.	RECEIVED 89 SEP 18 PM 12:25 SEP 19 1989 SEP 19 1989	4 SEP 19 1989 SEP 19 1989	Document #	110			
			number of notices	date docketed	docketing dpty. initials	date mld notices	mailing dpty. initials
			Date/time received in central Clerk's Office				
			courtroom deputy's initials				

United States District Court
NORTHERN District of ILLINOIS
 EASTERN DIVISION

UNITED STATES OF AMERICA **JUDGMENT INCLUDING
SENTENCE UNDER THE
SENTENCING REFORM ACT**
 V.

ALFONSO SOTO Case Number 89 CR 165-3

(Name of Defendant) Kenneth L. Cunniff
 Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____ .
☒ was found guilty on count(s) one, five and six
 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Count Number(s)</u>
21 USC 846	Conspiracy	1
21 USC 841(a)(1)	Possession with intent to distribute Cocaine	5 and 6

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ ,
 and is discharged as to such count(s).

- ☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
- ☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
- ☒ It is ordered that the defendant shall pay to the United States a special assessment of \$ 150.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:

319-64-7721

December 14, 1989

Date of Imposition of Sentence

Defendant's
mailing address:

/s/ Nicholas J. Bua

Signature of Judicial
Officer

3517 West 38th Street
Chicago, IL

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

Defendant's
residence address:

December 14, 1989
Date

Metropolitan
Correctional Center
Chicago, IL 60605

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED FIFTY-ONE (151) MONTHS .

IT IS ORDERED that defendant be given credit for time already served.

☒ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m.
p.m. on _____ .

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

 Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

 United States Marshal

By _____
 Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- [] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- _____

IN THE
 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,	)	No. 89 CR 165
)	
v.	)	JUDGE BUA
GLORIA ZAFIRO, JOSE MARTINEZ, ALFONSO SOTO and SALVADOR GARCIA,	)	(Filed Apr. 25, 1989)
)	
Defendants.)	

MOTION TO SEVER DEFENDANT SOTO FROM DEFENDANT GARCIA

Now comes the defendant, SALVADOR GARCIA, by his attorney, JOSEPH SIB ABRAHAM, pursuant to Rules 8B and 14 of the Fed. R. Crim. P. and moves to sever the aforementioned defendants' cases from each other. In support of said motion, defendant states as follows:

1. Alfonso Soto and Salvador Garcia were arrested with Gloria Zafiro and Jose Martinez and charged with sundry violations of Title 21 U.S.C. 841(a) (1) and 846 on February 22, 1989.

2. Subsequent to the aforementioned defendants' arrest, all four defendants were indicted by the Special May 1987 Grand Jury and charged together in the aforementioned indictment as follows:

- a) Alfonso Soto - Count 1: Conspiracy to distribute cocaine; Count 5: possession with intent to distribute 25 kilograms of cocaine; Count 6:

possession with intent to distribute 3.5 kilograms of cocaine.

b) Salvador Garcia – Count 1: Conspiracy to distribute cocaine; Count 5: possession with intent to distribute 25 kilograms of cocaine.

3. The prosecution alleges on information and belief (see attached search warrant/affidavit attached hereto as Exhibit 1) that Soto visited the home of Zafiro and Martinez on February 22, 1989, left that residence within a short period of time and went to 3517 W. 38th Street, Chicago, Illinois where he met with Garcia. Subsequently, Soto then returned to the Zafiro/Martinez residence where he was arrested along with Garcia while carrying a box containing 25 kilograms of cocaine.

4. Salvador Garcia's defense to which he will testify in the aforementioned indictment is that he had no knowledge of the contents of the box that he was carrying and that he was simply assisting Soto at Soto's request relative to delivering the box to the occupants of the home located at 1925 S. 51st Court, Cicero, Illinois (the Zafiro/Martinez residence). Additionally, Garcia will testify to the aforementioned by specifically inculping both Soto and the unknown occupants of the apartment wherein Zafiro and Martinez resided.

5. The attorney for Garcia has communicated with the attorney for Soto, Leland Shalgos, and has been advised by Shalgos that Garcia's defense is precisely the opposite of Soto's, *vis.* it is Soto's contention that it was Garcia and not Soto who performed the acts as alleged in the attached search warrant prepared by the government.

6. The defenses of Garcia and Soto conflict to the point of being irreconcilable and mutually exclusive and inconsistent because each defendant accuses the other of having performed acts which demonstrate culpability. See *United States v. Shively*, 715 F.2d 260 (7th Cir. 1983); *United States v. Oglesby*, 764 F.2d 1273 (7th Cir. 1985). As a consequence, the defenses that each defendant is going to interpose are antagonistic to one another and as a consequence will effectively deny each other a fair trial.

WHEREFORE, the defendant, SALVADOR GARCIA, requests this Honorable Court to sever the matter from that of ALFONSO SOTO.

Respectfully submitted,

SALVADOR GARCIA

BY: /s/ illegible
HIS ATTORNEY

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	BUA	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.
Case Number	89 CR 165-4	Date
Case Title	U.S. V. SALVADOR GARCIA	
	August 16, 1989	

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Sent for Microfilm
AUG 18 1989
AUG 21 1989
Filed on

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]
 Jury deliberation begins. Jury returns verdict of guilty on all counts. Court enters jury of guilty as to counts 1 and 5. Trial ends. Cause referred to probation department for presentence investigation. Sentencing is set for November 28, 1989 at 9:45 AM. Defendant to file post trial motions by 15 Sep 89, and government to file answer by 29 Sep 89.

(3) Filed motion of (use listing in "MOTION" box above).
 (4) Brief in support of motion due
 (5) Answer brief to motion due
 (6) Hearing Ruling on
 (7) Status hearing held continued to set for at
 (8) Pretrial conference held continued to set for at
 (9) Trial set for reset for at
 (10) Bench trial Jury trial Hearing held and continued to at
 (11) This case is dismissed without with prejudice and without costs by agreement pursuant to
 (12) FRCP 4(j) (failure to serve) General Rule 21 (want of prosecution) FRCP 41(a)(1) FRCP 41(a)(2)
 (For further detail see order on the reverse of order attached to the original minute order form.)

No notices required.	ED-1	number of notices	Document #
Notices mailed by judge's staff.	89 AUG 17 AM 6:50	4	
Notified counsel by telephone.		AUG 18 1989	
Docketing to mail notices.		sh	
Mail AO 450 form.		AUG 19 1989	
Copy to judge/magistrate.			
courtroom deputy's initials			
Date/time received in central Clerk's Office			
			161

United States District Court
NORTHERN **District of** ILLINOIS
 EASTERN DIVISION

UNITED STATES OF AMERICA **JUDGMENT INCLUDING
 SENTENCE UNDER THE
 SENTENCING REFORM ACT**
 V.

SALVADOR GARCIA Case Number 89 CR 165-4

(Name of Defendant) Joseph Sib Abraham
 Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____ .
☒ was found guilty on count(s) one and five after
 a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such
 count(s), which involve the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Count Number(s)</u>
21 USC 846	Conspiracy to possess with intent to distribute cocaine, heroin, and marijuana	1
21 USC 841(a)(1)	Possession with intent to distrib- ute cocaine	5

The defendant is sentenced as provided in pages 2
 through 4 of this Judgment. The sentence is imposed
 pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____ ,
and is discharged as to such count(s).
- ☐ Count(s) _____ (is)(are) dismissed on the
motion of the United States.
- ☐ The mandatory special assessment is included in the
portion of this Judgment that imposes a fine.
- ☒ It is ordered that the defendant shall pay to the
United States a special assessment of \$ 100.00 ,
which shall be due immediately.

It is further ordered that the defendant shall notify
the United States Attorney for this district within 30 days
of any change of residence or mailing address until all
fines, restitution, costs, and special assessments imposed
by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:

546-90-1475

November 28, 1989
Date of Imposition of Sentence

Defendant's
mailing address:

/s/ Nicholas J. Bua
Signature of Judicial
Officer

Metropolitan
Correctional Center
Chicago, IL

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

Defendant's
residence address:

November 28, 1989
Date

2604 Sea Breeze
El Paso, TX 77936

IMPRISONMENT

The defendant is hereby committed to the custody of
the United States Bureau of Prisons to be imprisoned for
a term of ONE HUNDRED FIFTY-ONE (151) MONTHS .

IT IS FURTHER ORDERED that defendant be given
credit for time already served.

☒ The Court makes the following recommendations to
the Bureau of Prisons: That defendant be incarcerated at
Oxford, Wisconsin.

☐ The defendant is remanded to the custody of the
United States Marshal.

☐ The defendant shall surrender to the United States
Marshal for this district,

☐ at _____ a.m.
p.m. on _____ .

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sen-
tence at the institution designated by the Bureau of
Prisons

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

 Defendant delivered on _____ to _____ at
 _____, with a certified copy of this Judgment.

 United States Marshal

By _____
 Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- [] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-3520, 89-3639,
89-3660, 89-3729

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GLORIA ZAFIRO, JOSE MARTINEZ,
SALVADOR GARCIA, and ALFONSO SOTO,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 165 – **Nicholas J. Bua**, Judge.

ARGUED JUNE 14, 1991 – DECIDED SEPTEMBER 26, 1991

BEFORE POSNER, MANION, and KANNE, *Circuit Judges.*

POSNER, *Circuit Judge.* The four defendants were tried together by a jury for offenses involving cocaine and other illegal drugs, and all were convicted. José Martinez was sentenced to 262 months in prison and the three other defendants – Alphonso Soto, Salvador Garcia, and Gloria Zafiro – to 151 months each even though the jury had acquitted Zafiro of possession with intent to distribute and convicted her only of participating in, or aiding and abetting, conspiracy. The verdict does not distinguish between actual participation on the one hand and aiding

and abetting on the other. At first glance it might seem odd that there could be (as the cases hold there can be, *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984)) separate crimes of conspiracy and of aiding and abetting a conspiracy – for would not the act of aiding and abetting make the aider and abettor a member of the conspiracy? Not necessarily. Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members – with whom he had had no previous, or for that matter subsequent, dealings – of the impending raid. He would be an aider and abettor of the drug conspiracy, but not a member of it. *United States v. Lane*, 514 F.2d 22 (9th Cir. 1975). For the essence of conspiracy is agreement, and there is none in our hypothetical case.

Of the issues raised by the defendants on appeal only two have sufficient merit to warrant discussion. The first is whether the judge should have granted the motions of Martinez, Soto, or Garcia for severance of their trials; the second is whether a reasonable jury could have found Zafiro guilty beyond a reasonable doubt. The government's case was simple. The three male defendants were acquaintances and Zafiro was Martinez's girl friend. The defendants operated a business of distributing illegal drugs at two locations – Zafiro's apartment in Cicero, Illinois, and Soto's bungalow-with-detached-garage in Chicago. One day, government agents followed Soto and Garcia as they transported a large box in Soto's car from Soto's garage to Zafiro's apartment. The agents identified themselves as they followed the two up the stairs to the apartment. Soto and Garcia dropped the box and ran into

the apartment, closely followed by the agents, who found all four defendants in the living room. The box contained 55 pounds of cocaine. Another 20 pounds were found in a suitcase in a closet in Zafiro's apartment and in a car in Soto's garage. The car was registered to another girl friend of Martinez's; he had given the car to her as a present but she had never used it.

The basis of the motions for severance by Soto and Garcia was that their defenses were mutually antagonistic. Soto testified that he didn't know anything about any drug conspiracy: Garcia had asked him for a box and he had given it to him; he didn't discover what was in it until it was opened when they were arrested. Garcia did not testify but his lawyer argued in closing argument that it was Soto's box and Garcia had known nothing about it. The basis of Martinez's motion for severance was that Zafiro's defense was antagonistic to his own. Zafiro testified that she was just a girl friend. Martinez stayed in her apartment from time to time, kept some clothes there, and gave her small amounts of money. But when he asked her whether he could store a suitcase in her closet he did not tell her that it contained narcotics and she had no idea it did. Martinez did not testify but his lawyer argued that Martinez had not known that cocaine was going to be delivered to Zafiro's apartment or that the suitcase in the closet contained cocaine; after all, it wasn't his apartment.

The government denies that the defenses of these various defendants were mutually antagonistic but concedes that if they were the defendants would be entitled to separate trials. The government describes this as a case merely of "finger-pointing," which it considers critically

different from presenting mutually antagonistic defenses although as an original matter we might have thought that for codefendants to point the finger of guilt at each other was about as forthright a gesture of mutual antagonism as could be imagined. Rule 14 of the federal criminal rules allows severance if a defendant (or for that matter the government) would be "prejudiced" by a joint trial. There is nothing about mutual antagonism. There is nothing, either, to suggest that two defendants cannot be tried together if it is certain that one but not both committed the crime and the only uncertainty is which one – the government's idea of when mutually antagonistic defenses bar a joint trial.

True, a vast number of cases say that a defendant is entitled to a severance when the "defendants present mutually antagonistic defenses" in the sense that "the acceptance of one party's defense precludes the acquittal of the other defendant," *United States v. Keck*, 773 F.2d 759, 765 (7th Cir. 1985) (though *United States v. McPartlin*, 595 F.2d 1321, 1334 (7th Cir. 1979), denies this proposition), but not when the defendants are engaged merely in "finger-pointing." *United States v. Buljubasic*, 808 F.2d 1260, 1263 (7th Cir. 1987); *United States v. Emond*, 935 F.2d 1511, 1514 (7th Cir. 1991). This formulation has become canonical. But we recall Justice Holmes's warning that to rest upon a formula is a slumber that prolonged means death. The fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid "the scandal and inequity of inconsistent verdicts." *Richardson v.*

Marsh, 481 U.S. 200, 210 (1987). Cf. *United States v. Buljubasic*, *supra*, 808 F.2d at 1263. The analogy of interpleader comes to mind, Fed. R. Civ. P. 22; also such joint-tort cases as *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948), and *Sindell v. Abbot Laboratories*, 26 Cal. 3d 588, 607 P.2d 924 (1980). And as we said earlier we are not clear why the case in which the acceptance of one party's defense precludes the acquittal of the other defendant could not be regarded as a paradigmatic case of finger-pointing. We must dig beneath formulas.

As an original matter, persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants. Two situations might fit this bill. The first is that of a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the alleged wrong-doing. The danger is that the bit players may not be able to differentiate themselves in the jurors' minds from the stars. Against that danger must be weighed the interest in trying all members of a conspiracy together so that the jury can get a complete picture and the government can save the expense of conducting multiple trials to break a single ring. This counterweight has invariably prevailed in the appellate cases, e.g., *United States v. Diaz*, 876 F.2d 1344, 1357-59 (7th Cir. 1989); *United States v. Moya-Gomez*, 860 F.2d 706, 754 (7th Cir. 1988); *United States v. L'Allier*, 838 F.2d 234, 241-42 (7th Cir. 1988); *United States v. Percival*, 756 F.2d 600, 610 (7th Cir. 1985) – we can find no recent reversals on this ground in this circuit, and only a couple in others. *United States v. Engleman*, 648 F.2d 473,

480-81 (8th Cir. 1981); *United States v. Salmon*, 609 F.2d 1172, 1175-77 (5th Cir. 1980). Either appellate courts have faith that the jury will obey instructions to consider the evidence regarding each defendant separately, or they defer to the district judge's judgment that a severance is not required. (They might defer as much to the opposite judgment, but such cases are underrepresented in an appellate sample. When the district judge grants a severance and the defendants go on to trial and are either acquitted or convicted, there is no possibility of appeal – well, almost none. If the government appeals the dismissal of an indictment or some other order made appealable by 18 U.S.C. § 3731, it may be permitted to challenge a severance under the doctrine of pendent appellate jurisdiction. *United States v. Maker*, 751 F.2d 614, 626 (3d Cir. 1984), allowed the government to challenge several severances in such a case, though without mentioning the doctrine or insisting on that close relatedness between the pendent and the independently appealable order that is a central element of the doctrine. *Patterson v. Portch*, 853 F.2d 1399, 1403 (7th Cir. 1988).)

A severance is more likely to be granted, and rightly so, when the defendants are not alleged to be members of a single conspiracy but instead are more loosely related to one another, for then the economies of a joint trial are fewer. *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985); *United States v. Castro*, 829 F.2d 1038, 1045-46 (11th Cir. 1987). Such cases are rare, however, because different offenders can be joined in a single indictment only "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P.

8(b). That will ordinarily require that they be charged, or chargeable, either as coconspirators or as aiders and abettors of a conspiracy. *United States v. Velasquez*, *supra*, 772 F.2d at 1353.

The second type of case in which a joint trial is likely to throw the jury off the scent is where exculpatory evidence essential to a defendant's case will be unavailable – or highly prejudicial evidence unavoidable – if he is tried with another defendant. For example, *Bruton v. United States*, 391 U.S. 123 (1968), holds that a limiting instruction is insufficient to dispel the prejudice to a codefendant of being inculpated in a defendant's confession, and in such a case either redaction (*Richardson v. Marsh*, *supra*) or severance may be necessary. And there are cases in which a person would refuse to testify for a codefendant in a joint trial for fear of incriminating himself, yet if tried separately and convicted might thereafter be willing to testify and might give testimony exculpating the other defendant. *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979) (*per curiam*). The danger of course is that all the codefendants will want to be tried last, producing impasse.

However that issue be resolved, mutual antagonism, finger-pointing, and other manifestations or characterizations of the effort of one defendant to shift the blame from himself to a codefendant neither control nor illuminate the question of severance. If it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted – and in either case there would be a miscarriage of justice. We can imagine, if barely, a situation in which all but one of

the defendants try to place the blame on that one, so that he finds himself facing in effect a barrage of prosecutors – the official prosecutor and the other defendants' lawyers. Maybe a jury would be misled in such a case, and if the danger was substantial the district judge would be obliged to grant a severance. That is not this case. Each member of each pair of defendants (Soto-Garcia and Martinez-Zafiro) was accusing the other of being the drug dealer. In this symmetrical situation, each defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing no one could question is that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a *net* disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial. Cf. *United States v. Madison*, 689 F.2d 1300, 1306 (7th Cir. 1982). And the benefit of the joint trial went beyond the avoidance of duplication. The jury was given the full picture, which it would not have had if the trial had been limited to two of the four alleged conspirators (one from each pair, since neither Soto nor Garcia complain of being tried with Martinez and Zafiro, and Martinez does not complain of being tried with Soto and Garcia). Joint trials, in this as in many other cases, reduce not only the direct costs of litigation, but also error costs.

We remind the defense bar that they are not obliged to make futile arguments on behalf of their clients. The argument that a conviction should be reversed because the district judge failed to sever properly joined defendants for trial is nearly always futile even when the defendants can be said to be presenting mutually antagonistic defenses.

We come to the second question, that of Zafiro's guilt. There was no direct evidence against her. The drugs were found in her apartment – as was she. If that were all the evidence, we would reverse her conviction with directions to acquit. Our system of criminal justice does not permit the conviction of a person for the crime of aiding and abetting, or for the crime of conspiracy, merely because he is found on premises where illegal drugs are delivered or kept. *United States v. Atterson*, 926 F.2d 649, 656 (7th Cir. 1991). Suppose Martinez and Zafiro had been married, and, unbeknownst to his wife, Martinez stored narcotics in the house or received deliveries there, or both. Obviously with no knowledge of what was going on she could not be convicted of participating in a drug-dealing conspiracy with him. Nor could she be convicted of aiding and abetting her husband's drug dealing. The crime of aiding and abetting requires *knowledge* of the illegal activity that is being aided and abetted, a *desire* to help the activity succeed, and some *act* of helping. *United States v. Pino-Perez*, 870 F.2d 1230, 1235 (7th Cir. 1989) (en banc); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.). In our hypothetical case not one of the three elements would be present. If the wife did know what was going on but did nothing to help her husband, the second and third elements would be missing and

again she would have to be acquitted. Whether she could be convicted of conspiracy would depend on whether she could be found to have agreed to participate in her husband's illegal activity; again, mere knowledge of that activity would not be enough. *United States v. Williams*, 798 F.2d 1024, 1028-30 (7th Cir. 1986).

Does it make a difference if, as here, the wife is not a wife but a girl friend and she lives in her own apartment, not her boyfriend's apartment or an apartment owned or leased jointly by them? It does. If the boyfriend is using her apartment in his drug dealings, then by providing the apartment for his use (whether or not she understands the nature of the use) she is helping his illegal activity, and the third element is satisfied; whereas a wife who merely does not prevent her husband from using their home for illegal purposes does not help his illegal activity in the relevant sense. But the girl friend's knowledge or lack thereof – the first element required for aiding and abetting – remains crucial. If she does not know what use her boyfriend is making of her apartment – if Zafiro did not know what was in the suitcase and did not know that Soto and Garcia were bringing a load of drugs to the apartment when the arrests took place – she is guilty neither of aiding and abetting nor of conspiracy.

To be proved guilty of aiding and abetting, still another element must be established: that the defendant desired the illegal activity to succeed. The purpose of this requirement is a little mysterious but we think it is to identify, and confine punishment to, those forms of assistance the prevention of which makes it more difficult to carry on the illegal activity assisted. A clerk in a clothing store who sells a dress to a prostitute knowing that she

will be using it in plying her trade is not guilty of aiding and abetting. *United States v. Giovannetti*, 919 F.2d 1223, 1227 (7th Cir. 1990); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 747 (3d ed. 1982). The sale makes no difference to her illegal activity. If the clerk didn't make the sale, she would buy, at some trivial added expense in time or money, an equivalent outfit from someone ignorant of her trade. That is where the requirement of proving the defendant's desire to make the illegal activity succeed cuts off liability. The boost to prostitution brought about by selling a prostitute a dress is too trivial to support an inference that the clerk actually *wants* to help the prostitute succeed in her illegal activity. If on the other hand he knowingly provides essential assistance, we can infer that he does want her to succeed, for that is the natural consequence of his deliberate act. It might be better in evaluating charges of aiding and abetting to jettison talk of desire and focus on the real concern, which is the relative dangerousness of different types of assistance, but that is an issue for another day.

In the case of conspiracy the additional element required for guilt is not desire for success, which can be assumed from proof that the defendant joined the conspiracy, but, precisely, the agreement. That element is not supplied by mere knowledge of an illegal activity either, let alone by mere association with other conspirators or mere presence at the scene of the conspiratorial deeds. *United States v. Williams*, *supra*; *United States v. Atterson*, *supra*.

So if all the government had in the way of evidence against Zafiro is that she and the drugs were both found in the apartment at the time of the arrest of her boyfriend

and his two associates, a reasonable jury could not convict her of either conspiracy or aiding and abetting any more than it could have convicted the girl friend whose car was found to contain illegal drugs and who was not even charged (granted, she apparently had never used the car). Guilt by association is not a permissible theory of criminal liability even in the war against drugs. But there is more in this case. A qualified expert witness – an experienced drug enforcement officer – testified that drug dealers do not discuss or deliver large quantities of illegal drugs in the presence of innocent bystanders. When arrested, Zafiro was in the living room of her apartment with Martinez awaiting the delivery by Soto and Garcia of 55 pounds of cocaine, no doubt to be stashed in the apartment until sold. And in Zafiro's closet was a suitcase full of cocaine. It is unlikely that a girl friend would be allowed to think that a suitcase with many thousands of dollars worth of cocaine actually contained a load of flea powder or that a heavy box of cocaine really was full of kitty litter. The witness's testimony about the methods of drug dealers may have been untrue, but Zafiro's counsel presented no testimony to the contrary. And if Zafiro knew that her apartment was being used as a stash house, she was knowingly rendering material assistance to her codefendants and desired that their malefaction succeed.

Zafiro took the stand to defend herself. She denied knowing anything about Martinez's drug dealings. Obviously the jury disbelieved her denials. The government cannot force a defendant to take the stand, of course, but if he does and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence. *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir.

1952) (L. Hand, J.). Concern has been expressed recently that "if negative inferences, based on demeanor evidence, were adequate in themselves to satisfy a rational juror of guilt beyond a reasonable doubt, appellate courts might not be able to provide meaningful review of the sufficiency of evidence." *United States v. Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991). Judge Hand had expressed the same concern in *Dyer v. MacDougall*, *supra*, 201 F.2d at 169. Such cases are unlikely to occur, however, for if there is no evidence of guilt other than what the defendant might supply by offering protestations of innocence that the jury disbelieved, he would have no reason to take the stand; he would be entitled to a directed acquittal at the close of the government's case. Zafiro's lawyer did move for directed acquittal then, but he does not cite the denial of that motion as error. We therefore need not decide whether, if Zafiro had not taken the stand, the testimony of the expert witness would have been enough to tip the scales of justice to guilt, given the heavy burden of proof that the government bears in criminal cases. That issue is moot. She testified, and on the basis of her demeanor and the expert testimony the jury was entitled to conclude that she knew what was in the suitcase and what was coming in the box. If she knew those things she knew that by providing her apartment for the storage of these containers she was aiding a drug conspiracy involving Martinez. No more was necessary to make her an aider and abettor of that conspiracy. Cf. *United States v. Percival*, 756 F.2d 600, 610-11 (7th Cir. 1985).

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 91-6824

Gloria Zafiro, Jose Martinez, Salvador
Garcia and Alfonso Soto,

Petitioners

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United
States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be, and
the same is hereby, granted.
